No. 21121

IN THE

United States Court of Appeals For the Ninth Circuit

RAYONIER INCORPORATED,
Appellant,

v.

F. ARNOLD POLSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the Honorable George H. Boldt sitting without a jury, in favor of appellee. The jurisdiction of the District Court was based upon diversity of citizenship under 28 U.S.C. 1332. The jurisdictional allegations appear in Paragraph I of the Amended Complaint (R. 99) and under the heading "Jurisdiction" in the Pretrial Order. (R. 131)

The jurisdiction of the Court of Appeals is based upon 28 U.S.C. 1291. Judgment for the appellee was entered May 9, 1966 (R. 368-9) and Notice of Appeal was given by the appellant on June 7, 1966. (R. 370)

STATEMENT OF THE CASE

A. Background

This Lawsuit

In 1959 Rayonier entered into two contracts with Nina Bumgarner, a Quinault Indian, whereby she agreed to sell and Rayonier agreed to cut, remove and pay for her undivided one-half interest in the merchantable timber on the two Bumgarner Allotments. (Pl. Ex. 13 and 14)

In 1960 defendant Rayonier entered into a similar contract with Cleveland Jackson, who was managing partner of a joint venture composed of himself and plaintiff F. Arnold Polson, with respect to the other one-half interest in the timber on the two Allotments. (Pl. Ex. 15)

During 1961 Rayonier cut, removed and paid for approximately 3,230,000 feet, board measure, of timber from the Bumgarner Allotments. (R. 140) On August 21, 1962, Polson, as surviving joint venturer, commenced this lawsuit against Rayonier contending that the Rayonier-Jackson contract was unauthorized and seeking $105,000 in treble damages for timber trespass under the provisions of R.C.W. 64.12.030. (R. 1-5) Prior to trial the plaintiff amended his complaint to allege as an alternative cause of action a claim for treble damages for waste under the provisions of R.C.W. 64.12.020. (R. 102-3)

On May 7, 1966, Judge Boldt entered a judgment in favor of plaintiff for $69,000 treble damages for timber trespass, together with interest on single damages ($23,000) from the date of trespass. Against this amount the Court allowed a set-off of the amount that had been

paid by Rayonier pursuant to the contract to the Estate of Cleveland Jackson. (R. 368) The court further held that in the event that upon review it should be determined that Rayonier had not committed a trespass, then he would find, in the alternative, that it had committed waste. (R. 361)

The Bumgarner Allotments

Under Quinault Allotments Nos. 1678[1] and 1679[2] certain land and timber was allotted respectively to Jean Irene Bumgarner and Shirley Blanche Bumgarner, Quinault Indians. The allotments were primarily forest lands and their most valuable and best use was for growing timber and harvesting logs and other forest products. (R. 140)

Shirley and Jean Bumgarner died in their childhood in the 1930's and upon their deaths, their mother, Nina Bumgarner, a Quinault Indian, inherited an undivided one-half interest in each allotment and their father, Wallace Bumgarner, a white man, inherited the other undivided one-half interest in each allotment. Fee patents to undivided one-half interests in each allotment were issued in the name of Wallace Bumgarner. However, Nina Bumgarner's undivided one-half interest was held in trust for her by the United States of America pursuant to applicable federal laws and regulations promulgated thereunder. (R. 134)

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1. W½ of the SW¼ of Section 15, Township 22 N., Range 11 W.W.M., Grays Harbor County, Washington.

2. E½ of the NE¼ of Section 10, Township 22 N., Range 11 W.W.M., Grays Harbor County, Washington.

The Polson-Jackson Joint Venture

The plaintiff, F. Arnold Polson, is the surviving joint venturer of a joint venture between himself and Cleveland Jackson which was formed in approximately 1947 for the purpose of acquiring, selling, exchanging and disposing of timber and timberland in Western Washington, including the logging or contracting for the logging of any timber so acquired. (R. 133; Pl. Ex. 1; F.F. 3, R. 335) The terms and conditions of the Joint Venture are set forth in an agreement dated March 5, 1951. (R. 133; Pl. Ex. 1)[3] During the period from 1947 until his death on November 7, 1960, Jackson was the manager of the Joint Venture and handled its affairs. (Def. Ex. A-45; F.F. 3, R. 335)

The Crane Creek Contract

Rayonier was the successful bidder at public auction on the Crane Creek Contract (Pl. Ex. 4), which contract, when consummated, was dated June 18, 1952, and was between the Superintendent, Western Washington Indian Agency (hereinafter referred to as the "Superintendent") and Rayonier. (R. 137)[4]

L. J. Forrest

Mr. Forrest has been employed by appellant Rayonier

3. The Agreement was recorded in Vol. 337 of Deeds at p. 444, records of Grays Harbor Count, Washington.

4. The Crane Creek Contract is the overall or master contract between Rayonier and the Superintendent, Western Washington Indian Agency, whereby Rayonier agrees to purchase, on stated terms and conditions, all merchantable timber located on the approximately 35,000 acres in the Crane Creek Cutting Unit, Quinault Indian Reservation, that is owned by Indian owners and is offered for sale by the owners to Rayonier. When the timber on an allotment is offered to Rayonier by the Indian

at its Hoquiam, Washington, office since 1947. He is a Vice President of Rayonier, General Manager of Northwest Timber Operations, and the Chief Executive Officer of Rayonier in the State of Washington. Forrest was employed by the Polson Logging Co. from 1927 until the date of its acquisition by Rayonier in 1947 and for a portion of the period served as a member of its Board of Directors and as its Secretary. Plaintiff Polson was also employed by the Polson Logging Co. during the period from 1927 through 1947, was Director and Manager of the Company during 1947 and for some years prior. (R. 135) From 1947 through 1962 both Forrest and Polson maintained homes in Hoquiam and have had occasional contacts with each other. However, during the five years or more preceding 1962 these contacts were infrequent. At all times material to this lawsuit Polson knew that Forrest was employed by Rayonier and both Polson and Forrest knew how to contact each other, although not immediately or within any specific limited period of time. (R. 135-6)

Frank D. Beaulieu

Frank D. Beaulieu, a member of the bars of the Supreme Court of the State of Minnesota, Supreme Court of the United States and the United States District Court

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owner, a separate contract is prepared, which contract is executed by the allottee and Rayonier and approved by the Superintendent, Western Washington Indian Agency. Frequently the individual contract between Rayonier and the Indian owner is executed by the Superintendent, Western Washington Indian Agency, for and on behalf of the Indian owner pursuant to a power of attorney previously executed by the owner. A copy of the Crane Creek Contract is Pl. Ex. 4. An example of the standard Indian Allotment Contract is Pl. Ex. 13 and an example of the standard Power of Attorney is Pl. Ex. 7.

for the Western District of Washington, was employed by the Bureau of Indian Affairs at its Hoquiam office until June 1, 1951. (Tr. 427-30) At that time he resigned from the Bureau of Indian Affairs and was employed by Polson to assist Polson and Jackson in connection with Joint Venture matters. (Tr. 434, 443) Beaulieu also performed occasional legal services for Polson on matters not related to the Joint Venture. (Tr. 436) Beaulieu testified that he was an employee of Polson and that his allegiance was to Polson. (Tr. 436) From 1950 through 1962 Polson maintained offices in Hoquiam, Washington, at 419 Simpson Avenue, which office space was divided into two offices with a door between them. Beaulieu was provided with one of the two offices; Polson used the other office. (Tr. 438) Beaulieu was on a salary basis until August 31, 1960, and on an hourly basis thereafter until March 1, 1961. (Tr. 440; Def. Exs. 6 and 7)

Cleveland Jackson

Cleveland Jackson was Chief of the Quinault Indian Tribe from the mid-1930's until his death on November 7, 1960. (R. 136) Jackson was retained by the Polson Logging Company as an independent timber cruiser during the period that Polson was its manager. Jackson continued in this capacity with Rayonier from 1947 until his death in November 1960, with a retainer of approximately $400 a month. (Tr. 238) Jackson was not required to perform a specific amount of cruising or other services each month, but was expected to be available to perform such services as were requested by Forrest or other Rayonier employees. (Tr. 238-9) As Jackson was almost

seventy years old at the time of his death in 1960, the majority of his services after 1956 involved the obtaining of proxies from Indians for road rights-of-way in the Quinault Indian Reservation. (Tr. 239, 245, 246)

Forrest had known Cleveland Jackson from 1935. F. Arnold Polson had been a close friend of Jackson from the 1930's until Jackson's death. (Tr. 37) Both Polson and Forrest had great confidence in Jackson and trusted him. (Tr. 37; Tr. 604) John W. Libby, who was Forest Manager for the Western Washington Indian Agency, until his retirement in 1965, knew Jackson for years and testified "you could count on his word once it was given. . . ." (Tr. 396)

John W. Libby

Libby is a graduate of the Forestry School, Oregon State College, and was employed by the Bureau of Indian Affairs from 1930 until his retirement in 1965. (Tr. 353-4) Libby's office was at Hoquiam, Washington, from 1950 until June, 1958, when he was transferred to Everett, Washington. From 1950 to 1965 Libby was Forest Manager of the Indian Agency. (Tr. 354)

Nina Bumgarner

Nina Bumgarner, an elderly Indian woman in poor health and badly in need of assistance, was the owner of an undivided one-half interest in each Bumgarner Allotment. In a real sense, Mrs. Bumgarner is a pivotal figure in this suit, because the logging contracts here involved were made as an accommodation to provide her with money. (Ex. 68) She owned timber of substantial

worth, but could not easily realize upon it because her ownership was of an undivided interest and could not be marketed without the remaining interest joining with her. (Ex. 87) Nina Bumgarner wanted her timber logged (Tr. 450, 604), the Western Washington Indian Agency wanted her timber logged (Ex. 68, 87), and Cleveland Jackson and Frank Beaulieu wanted the timber logged (Tr. 464, 450, 604), and Rayonier, while under no need or compulsion, was willing to accommodate all interested by logging the timber, even though it was a departure from Rayonier's then logging plans. (Tr. 604; Ex. 108) Rayonier had no ax to grind, no special benefits to be gained and no ulterior motives by contracting with each of the record owners of the undivided interests in the two allotments. (Tr. 604) The price it agreed to pay and paid for the timber was that established by the Indian Service under Rayonier's Crane Creek Timber Contract and must be regarded as the fair market value of the timber that was removed. (R. 166)

B. Acquisition of a One-Half Interest in the Bumgarner Allotments

On approximately September 26, 1951, Jackson acquired in his name Wallace Bumgarner's undivided one-half interest in the Bumgarner Allotments. (R. 134) Jackson reported to Polson that he had paid Bumgarner approximately $4,350.40 for his interest. (R. 135) On August 5, 1953, Jackson and his wife, executed a Declaration (Pl. Ex. 3) that he was holding title to an undivided one-half interest in the Bumgarner Allotments on behalf of the Joint Venture and that he was without power to

"contract in respect thereto except in accordance with the terms of the (1951 Joint Venture) Agreement. . . ."[5] The interests in the two Bumgarner Allotments were but two of over 100 Indian Allotments in the Quinault Indian Reservation in which the Polson-Jackson Joint Venture acquired an interest (Def. Ex. A-1).

C. 1954 Memorandum of Intent

In 1954 Rayonier and Jackson entered into a letter of intent whereby Rayonier advised Jackson that if it was, at some time in the future, provided with a recordable easement for a right-of-way across certain described lands, it would allow Jackson to use its road system for the purpose of logging other described lands. (Pl. Ex. 5) L. J. Forrest of Rayonier handled the negotiations with Jackson and was aware at that time of the existence of a Joint Venture between Jackson and Polson and that parts of the property described in the letter of intent were involved in the Joint Venture. (Tr. 599-600)

Jackson told Forrest at the time that the letter was completed that he had to obtain Polson's consent to the matter. (Tr. 600) Shortly thereafter Jackson advised Forrest that Polson did not understand the matter and had refused to consent to it. (Tr. 276, 601) Thereafter, on approximately June 2, 1954, Rayonier's Seattle office received a letter by registered mail from Polson (Pl. Ex. 6), which letter advised Rayonier that Polson had not consented to the letter. Forrest was advised by telephone of the letter but did not see a copy of it (Tr. 305) and

5. The Declaration was recorded on May 5, 1954, with the Auditor of Grays Harbor County, Washington.

was directed at that time by his superior, M. B. Houston, of Rayonier's Seattle office, to abandon the project, which he did. (Tr. 601)

On June 8, 1954, Rayonier obtained a copy of the 1951 Joint Venture Agreement from the Grays Harbor County Auditor. Thereafter, and prior to April 23, 1958, Rayonier's Land Department, at the request of Forrest, made a complete survey of the property within the Quinault Indian Reservation that was owned by Polson, by the Polson-Jackson Joint Venture, and by the Polson family as Rayonier was contemplating attempting to acquire the properties. (R. 138; Tr. 269-271; Pl. E. 31) The acreage and volume of the timber and timber lands were summarized in a Memorandum to Forrest dated April 23, 1958. (R. 138; Pl. Ex. 31) Rayonier's Land Department was also instructed at that time to keep track of what property the Joint Venture acquired, which it did. (Tr. 271)

D. Negotiations With the Bureau of Indian Affairs Prior to the Rayonier-Jackson Contract

John W. Libby became aware that Jackson was acquiring the non-trust interests in Quinault allotments during 1950-1954 and learned of the existence of the Polson-Jackson Point Venture prior to 1954. (Tr. 356)

Prior to 1954 Libby discusssed with Jackson the possibility of entering into logging contracts on the two Bumgarner Allotments, the three Snell Allotments and other allotments. (Tr. 357) Also, prior to January 8, 1954, a tentative agreement had been made between Jackson and the Bureau of Indian Affairs to partition the two

Bumgarner Allotments. (Tr. 358) It was in this connection that a letter on behalf of Jackson was written to the Indian Agency on January 8, 1954. (Def. Ex. A-33-B) Libby also discussed the partition of the Bumgarner Allotments several times with Beaulieu at Polson's Hoquiam office. (Tr. 418) On one such occasion Polson was seated in the next office with the door open. (Tr. 361)

In 1956 and 1957 Libby again discussed with Jackson partition of the two Bumgarner Allotments (Tr. 360). Apparently Jackson refused to proceed with the partition because of a federal tax lien. (Tr. 358, 362, 365; Exs. 72, 76, 78, 82) Consequently, in approximately 1958, the Indian Agency undertook to sell Mrs. Bumgarner's undivided one-half interest in the two allotments by public auction. (Tr. 363) Mrs. Bumgarner's undivided one-half interest was advertised for sale, but no bids were received. (Tr. 367)

In all of his dealings from 1951 through 1960 with Joint Venture, Libby understood that Jackson had authority to speak for the partnership. (Tr. 365, 366, 418) Whenever he talked to Beaulieu he was invariably referred by Beaulieu to Jackson. (Tr. 366, 418) Frequently when he conferred with Jackson, Jackson told him that he would consult with Polson and give them an answer. (Tr. 366) Whenever Beaulieu attempted to discuss Joint Venture matters with Polson, he would be directed by Polson to take the matter up with Jackson, not with Polson. (Tr. 498, 499, 446)

Thereafter, on December 30, 1958, the Indian Agency wrote to Mrs. Bumgarner suggesting that her interest in

the Bumgarner Allotments be placed under the Crane Creek Contract with Rayonier. (Ex. 78)

On January 7, 1959, the Superintendent wrote to Cleveland Jackson asking him what progress had been made in removing the lien that had delayed partition of both the Bumgarner and Snell Allotments. (Ex. 80)

On January 13, 1959, Jackson responded advising that the tax lien was still on the property and suggesting that the most feasible way to proceed would be to have Rayonier log the Allotments. (Ex. 82)

E. Events Prior to the Rayonier-Jackson Contract

After January 13 and prior to March 18, 1959, Libby contacted Wilton L. Vincent, the Manager of Rayonier's Land Department, Northwest Timber Division, and discussed with Vincent the possibility of including the two Bumgarner Allotments under the Crane Creek Contract. (Tr. 373) This discussion was followed by a letter of March 18, 1959 (Ex. 86), from the Indian Agency to Rayonier. On March 11, 1959, Nina Bumgarner signed powers of attorney (Pl. Exs. 7 and 8) whereby she authorized the Superintendent to enter into individual contracts on her behalf with Rayonier, pursuant to the Crane Creek Contract. (R. 141)

On May 12, 1959, the Superintendent wrote to Jackson (Ex. 92) stating that:

> "We have been authorized to enter into contract with Rayonier for sale of Mrs. Bumgarner's half interest, providing you will agree to sell your half interest under the same terms and conditions."

On May 15, 1959, Jackson responded (Ex. 93) stating that he had talked to Forrest of Rayonier and that he would put one of the Bumgarner Allotments under contract to Rayonier in 1959 and would put the second allotment under contract whenever Rayonier could log it. In this letter Jackson asked that they send a Power of Attorney for him to sign in order to effect a contract on Bumgarner Allotment No. 1679.

During May and June 1959 the Indian Agency made one additional attempt to partition the two Bumgarner Allotments. Prior to June 12, 1959, proposed deeds accomplishing such a partition had been left with Frank Beaulieu (Tr. 487; Def. Ex. A-33-C) and on June 12, 1959, the Superintendent wrote to Beaulieu enclosing new deeds to accomplish the proposed partition. (Ex. 94)

On June 18, 1959, Jackson wrote the Indian Agency (Ex. 95) rejecting the proposed partition. In this letter Jackson stated that:

> "Therefore I believe the suggestion I made in my last letter before this last partition proposal came up, in which I wrote that I had contacted Rayonier and that they will log the Shirley Bumgarner allotment this summer if given the contract, as they have a road very close to it, while the other tract is several years away. In this way, Mrs. Bumgarner will get funds soon, which is the only thing she is interested in."

Also, on June 18, 1959, Beaulieu wrote to the Indian Agency. (Ex. 96) In this letter Beaulieu recited the fact that the previous week Mr. DuBray (an official of the Agency) called at Polson's Hoquiam office and that he and DuBray had conferred regarding an exchange of

interests in the Bumgarner Allotments. At that time the deeds to effect the exchange were left with Beaulieu as he was handling the matter. (Ex. A-33-C; Tr. 487) On Jackson's return Beaulieu discussed the exchange with Jackson and was advised by Jackson that it was unacceptable. (Ex. 96) Beaulieu concluded the letter by stating:

> "Mr. Jackson is willing to cooperate in the matter when and if the conditions can be stabilized more in harmony with all the facts and conditions as they exist.
>
> "He has suggested that it would be entirely possible and feasible to work out a plan to contract with Rayonier Incorporated to cut and log all of the timber on either one of the allotments as Rayonier has already constructed logging road in close proximity to these lands. In such a plan he would agree to also permit Rayonier log his half interest. This would afford a fair deal to both, Mr. Jackson and Mrs. Bumgarner without expense to either party. Rayonier would in all probability welcome the opportunity to log the lands on satisfactory prices and operations. Also, Mrs. Bumgarner would obtain cash for her interest which undoubtedly she needs and desires."

On June 24, 1959, the Superintendent responded to Jackson's letter of June 18. (Ex. 97) In this letter Jackson was advised that if Mrs. Bumgarner's interests were to be placed under the Crane Creek contract, it would be necessary for Jackson to execute and return all the copies of the Addendum to Timber Sale Contract that were enclosed.

A copy of the letter to Jackson was forwarded to Beaulieu at Polson's Hoquiam office, together with a letter

to him of June 25, 1959, from the Superintendent responding to his letter of June 18, 1959. (Ex. 98) Shortly thereafter the Indian Agency received the executed Addendums (Exs. 9 and 10) from Jackson.

On July 24, 1959, the Superintendent sent timber contracts covering Nina Bumgarner's interest in the Bumgarner Allotments to Rayonier for execution and return. (Ex. 99)

On August 26, 1959, Rayonier wrote to the Superintendent (Ex. 101) requesting that he forward to Rayonier a copy of the Agreement with Jackson of which the Indian Agency had recently advised Rayonier. On that same date Rayonier forwarded the executed Timber Contracts (Pl. Exs. 13 and 14) on the two Bumgarner Allotments to the Superintendent for approval. (Ex. 102)

Thereafter, on August 27, 1959, Libby, as Acting Superintendent, wrote Rayonier that they had approved the allotment contracts and enclosed copies of the contracts. (Ex. 103) Attached to the copy of the contract for each allotment was a copy of the Addendum signed by Jackson (Pl. Exs. 9 and 10), and Powers of Attorney signed by Nina Bumgarner. (Pl. Exs. 7 and 8) The letter further advised that an advance payment was due in thirty days and requested payment. On September 11, 1959, Rayonier forwarded its check in the amount of $3,400.85 in payment of the advance payment. (Ex. 106)

Negotiations between Rayonier and Jackson for a timber cutting contract on the Bumgarner Allotments commenced in early 1959 and Forrest and Jackson met to-

gether several times concerning the matter. Wilton L. Vincent was present at one such meeting. (R. 139) Both Vincent and Forrest were aware at that time that an undivided one-half interest in the Bumgarner Allotments was owned by Jackson and was the subject of an agreement between Polson and Jackson, and they discussed that fact during the period they were negotiating with Jackson. (R. 139)

At the time of his meetings with Jackson, Forrest knew that Jackson was managing the Joint Venture to all intents and purposes (Tr. 603; 307), was corresponding and meeting with officials of the Bureau of Indian Affairs (Tr. 604), and had dealt with the United States Forest Service (Tr. 603, 373, 564; Def. Ex. A-49); and that Jackson had discussed possible division of both the Bumgarner Allotments and the Snell Allotments with the Indian Service. (Tr. 604)

In addition, Forrest knew that Polson had an aversion to Rayonier. (Tr. 224-6) During the negotiations Jackson told Forrest that Polson did not want to get involved with Rayonier with respect to the Bumgarner Allotments as Polson did not want to be put in a position of negotiating anything with Rayonier. (Tr. 604) However, Jackson said that Polson was willing to go along and let Mrs. Bumgarner have some money and "take Mrs. Bumgarner off their necks." (Tr. 604) As Beaulieu testified: "She [Mrs. Bumgarner] made it pretty bad for us. She wanted her interests sold." (Tr. 450) Although the Bumgarner Allotments were of little significance to Rayonier, the Bureau of Indian Affairs was exerting pressure on

Rayonier in order to get the matter settled, and after Jackson executed the Addendums with the Bureau of Indian Affairs, Rayonier entered into the Rayonier-Jackson Contract. (Tr. 604)[6] Neither Forrest nor any other representative of Rayonier communicated with Polson concerning the Rayonier-Jackson contract or the negotiations with respect to it. (R. 140)

Forrest requested that Vincent have Rayonier's attorney prepare an agreement between Rayonier and Cleveland Jackson and his wife. On about August 31, 1959, Vincent requested Rayonier's attorneys to prepare a draft. The requested draft was forwarded to Rayonier on about September 29, 1959, and was executed and delivered to Jackson shortly thereafter. (R. 139) Jackson and his wife executed the contract and returned it to Rayonier on about February 9, 1960. (R. 139) The executed contract is Pl. Ex. 15.

During 1959 and 1960 both Jackson and Polson were anxious to sell the Joint Venture properties. (Tr. 74) During that period Jackson was actively negotiating with several prospective purchasers. (Tr. 67-75)

On February 10, 1960, Beaulieu telephoned Forrest and requested information with respect to whether the Rayonier-Jackson contract (Pl. Ex. 15) would be recorded and when logging would commence on the Bumgarner Allotments. (Def. Ex. A-51; Tr. 291, 611)

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6. See also Ex. 68, where the Superintendent states on page 2: ". . . the contracts on the Bumgarner Allotments were instigated by us, following fruitless efforts to affect their partitionment, as the only way we could secure the income from the timber for its owner, Mrs. Nina Bumgarner."

Forrest wrote a note (Def. Ex. A-51) to Wilton Vincent at the time of the telephone call. The contract was not recorded.

F. Investigation By Polson of Joint Venture Properties

In August, 1960, Beaulieu prepared several schedules of Joint Venture lands at the request of Polson. One of these schedules (Def. Ex. A-1), which is dated August 15, 1960, states on page 1 opposite the Bumgarner Allotments: "Log Contract—Jackson, Rayonier, Bumgarner." A second schedule (Def. Ex. A-14), which is of particular relevance, states on page 1 after the Bumgarner Allotments:

> "Logging contracts made and approved by and between Cleveland Jackson and Rayonier, Inc., approved by B.I.A. [Bureau of Indian Affairs] 1960."

A third schedule (Def. Ex. A-15) states on page 2 opposite the Bumgarner Allotments "Timber Contract 1960." These schedules, as well as Def. Ex. A-18 were transmitted by Beaulieu to Polson's daughter for preparation of copies and delivery to Polson by letter dated August 19, 1960 (Def. Ex. A-5). Polson discussed the schedules with Beaulieu while he was gathering the information and preparing the schedules and requested that Beaulieu expedite their preparation. (Tr. 96, 97, 100)

In June or July 1960 Polson retained the law firm of Ryan, Askren, Carlson, Bush & Swanson, Seattle, Washington, to represent him in connection with a complete investigation of the Polson-Jackson Joint Venture and its assets, including what property and timber had been ac-

quired and what disposition had been made of the property that had been acquired. Raymond Swanson and Richard K. Bush at that time were and are still partners in that law firm. (Tr. 179, 180)

Raymond Swanson and Beaulieu went to the Everett office of the Western Washington Indian Agency on November 14, 1960, to obtain information concerning Joint Venture assets. Swanson had received a copy of one of Beaulieu's schedules (Def. Ex. A-1) on approximately that date and Swanson and Beaulieu had a copy of it with them on the trip to Everett. (Tr. 425, 466-7) At that time and at their request Libby investigated the status of logging on the parcels listed on the schedule, wrote opposite the Bumgarner Allotments "Portions scheduled for logging" on a copy of the schedule and returned the marked copy to them. (Tr. 425) This marked copy is Ex. A-1-A.

On January 20, 1961, Polson, Bush and Swanson met in Hoquiam, Washington, with Anna Jackson, the widow of Cleveland Jackson, John Kirkwood, her attorney, and James Jackson, her son. Polson testified that it was this meeting that

> "alerted me to a situation . . . There was something going on that I didn't know about . . . I [promptly] conferred with my attorney on it . . . I put it in his hands, to get as much information on it as he could." (Tr. 161)

Shortly after the January 20, 1961, meeting in Hoquiam a copy of the Rayonier-Jackson Contract (Pl. Ex. 15) was left on Polson's desk at his Hoquiam office and came

into his possession. (Tr. 163-4)

On January 28, 1961, Beaulieu wrote to Polson (Def. Ex. A-39-A):

> "Enclosed is . . . copy of agreement between Cleve and the Indian Bureau regarding sale of the two Bumgarner Allotments, which Jim Jackson [Cleveland Jackson's son] left at the office for you."

Appended to the letter was a copy of the Addendum to Timber Sale Contract (Def. Ex. A-39-C and Pl. Exs. 9 and 10) for Allotment No. 1678 and the original of a handwritten note from L. J. Forrest of Rayonier to James Jackson dated November 30, 1960 (Def. Ex. A-39-D) forwarding to Jackson a copy of the Addendum.

Bush received Beaulieu's letter of January 28, 1961 (Ex. A-39-A), Forrest's note (Ex. A-39-D) and the Addendum (Ex. A-39-C) from Polson shortly after January 28, 1961 (Tr. 557-8).[7]

Bush went to the Indian Agency Office in Everett, Washington, between the period of February 15, 1961, and April 15, 1961, and obtained information from the Agency with respect to the Joint Venture properties. (Tr. 549-555) At that time he prepared a worksheet setting forth such information (Def. Ex. A-13), page 1 of which worksheet recites with respect to Bumgarner Allotment No. 1679:

> "Log in progress. Payments made by Rayonier directly to Jackson, less 10% Ind. Service Fee."

7. At that time logging had not commenced on Allotment No. 1678 and had been underway for approximately 20 days on Allotment No. 1679 (F.F. 9 and 10, R. 142 and R. 334).

Page 1 of Ex. A-13 recites with respect to Bumgarner Allotment No. 1678:

> "No logging. Payments made direct to C. J. [Cleveland Jackson] on undiv. ½, less 10% Indian Service Fee."

Page 2 of Ex. A-13 recites with respect to the Bumgarner Allotments under the heading "Distributed to Jackson":

> "None through this Agency—paid directly to C. J. [Cleveland Jackson] by Rayonier, Inc. in acc. [accordance] with terms of Add. [Addendum] to Cont. [Contract]:"

The Addendums to which reference is made are Pl. Exs. 9 and 10.

In addition to his trips to the Indian Agency office, Bush also discussed the Rayonier-Jackson Contract with Beaulieu not later than March 1961. (Tr. 562-3)

G. Logging By Rayonier on the Allotments

Road construction by Rayonier was commenced in November, 1960. Logging commenced on January 10, 1961, on the Allotment No. 1679 and on April 17, 1961, on Allotment No. 1678. (R. 142, 334)

During the period February 16 through August 24, 1961, Rayonier made payments totaling $19,815.36 to Anna Jackson as Executrix of the Estate of Cleveland Jackson, which payments were made pursuant to the Rayonier-Jackson Contract. Over $12,000 of the payments were made after July 20, 1961 (Def. Exs. A-46-A through A-46-G).

In addition, Rayonier made payments to and received

credits for payments of $2,193.89 to the Indian Agency during the period of February 16, 1961, through August 24, 1961, for the 10% administrative fee pursuant to the Addendums (Pl. Exs. 9 and 10) and the Rayonier-Jackson Contract. (Pl. Ex. 15) (R. 140)

H. Creditor's Claim and Demands Upon Jackson Estate

In June 1961 Polson filed a Creditor's Claim in the Cleveland Jackson Estate.[8] (Def. Ex. A-19-E)

At the time that Polson filed the creditor's claim he was aware that the Jackson Estate had received monies from Rayonier for timber that had been cut and removed from the Bumgarner Allotments (Tr. 125) and testified:

> ". . . there was some money in evidence and perhaps available . . . and we didn't have the exact accounting of it, and we couldn't get it, so we made a claim for it." (Tr. 126)

During the last half of 1961 and during 1962 Bush, on behalf of Polson, made a standing demand upon John Kirkwood, as attorney for Anna Jackson as Executrix of the Jackson Estate, for payment to Polson of the proceeds of approximately $20,000 received by Anna Jackson as Executrix of the Jackson Estate from Rayonier pursuant to the Rayonier-Jackson Contract. (Tr. 566-9)

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8. Item "d" of said claim provided: "Monies received by deceased from the sale of timber situated upon lands purchased and owned by deceased and claimant pursuant to an Agreement of Joint Venture between them dated March 5, 1951, as amended by Supplementary Agreement dated January 4, 1955, and as restated and modified by Agreement of Joint Venture dated November 5, 1957, together with interest thereon at the legal rate from the date of receipt of said monies by decedent until paid to claimant. By the terms of said Agreements, said monies were to have been paid in their entirety to claimant."

I. Communications Between Bush and Rayonier

On November 3, 1961, Richard K. Bush, Polson's attorney, wrote a letter to L. J. Forrest of Rayonier to attempt to arrange a meeting to discuss Cleveland Jackson and his activities (Def. Ex. A-57) and made no mention of any irregularity or problem concerning the Rayonier-Jackson Contract, the Bumgarner Allotments, or the logging of the Bumgarner Allotments by Rayonier. On November 9, 1961, Bush wrote another letter to L. J. Forrest of Rayonier concerning the same subject (Def. Ex. A-56) and again made no mention of the Bumgarner Allotments, the Rayonier-Jackson Contract, or the logging by Rayonier.

In November 1961 Bush conversed with L. F. Marion, one of Rayonier's attorneys, concerning a possible meeting with L. J. Forrest to discuss Cleveland Jackson and his affairs and again made no mention of the Bumgarner Allotments, of the Rayonier-Jackson Contract or any irregularities. (Tr. 578)

J. First Notice to Rayonier—July 23, 1962

On July 23, 1962, Bush wrote to Rayonier (Def. Ex. A-55). This letter was the first time that Polson or anyone on his behalf asserted to Rayonier that Polson was contending that the Rayonier-Jackson Contract was unauthorized or that the logging by Rayonier on the Bumgarner Allotments was unauthorized.

K. Suit By Polson Against Jackson Estate

On approximately February 15, 1963, Polson commenced a lawsuit against Anna Jackson individually and

as Executrix of the Estate of Cleveland Jackson in Grays Harbor County Superior Court. A copy of the complaint in that lawsuit is Def. Ex. A-20-D. It is stipulated that the references in paragraph XI of the First Cause of Action (p. 4, Ex. A-20-D) and paragraph IV of the Second Cause of Action (p. 6, Ex. A-20-D) to "The sum of Twenty Thousand Dollars ($20,000), more or less," refer to the payments that had been made by Rayonier to Anna Jackson, as Executrix of the Jackson Estate, pursuant to the Rayonier-Jackson Contract for timber cut and removed from the Bumgarner Allotments. (Tr. 132-3, 595)

Polson testified that he considered the $20,000 in proceeds from the Rayonier-Jackson Contract to be the property of the Joint Venture and made the allegations in paragraph XI of the First Cause of Action (Ex. A-20-D) on the basis that he, Polson, was entitled to have said funds paid to him pursuant to the 1951 Polson-Jackson Joint Venture Agreement. (Tr. 135-6)

L. Settlement of the Suit By Polson Against the Jackson Estate

On March 13, 1963, John Kirkwood advised Bush by letter (Def. Ex. A-43) that Anna Jackson, as Executrix of the Jackson Estate, made no claim to the $20,000 in proceeds that had been received by her from Rayonier pursuant to the Rayonier-Jackson Contract and offered to transmit the funds to Bush at that time.

Thereafter, a settlement was entered into between Polson and Anna Jackson, individually and as Executrix, of the lawsuit that had been commenced by Polson against

Anna Jackson in Grays Harbor County Superior Court.[9]

The provision of Ex. A-20-B with respect to the contract proceeds was not requested by Kirkwood or by Anna Jackson, but was a part of the settlement agreement prepared by Polson or his attorneys and presented to them. (Tr. 520) The Jackson Estate was making no claim to the $20,000 in proceeds paid by Rayonier for timber cut and removed from the Bumgarner Allotments at the time that the settlement was made and the agreement executed. (Tr. 520) Pursuant to the settlement agreement (Ex. A-20-B) Bush prepared an escrow agreement between Polson, Anna Jackson and the National Bank of Commerce (Def. Ex. A-20-A) which agreement was executed by Polson, Anna Jackson as Executrix of the Estate of Jackson and the Bank. (Tr. 521, 591)[10] Pursuant to the Escrow Agreement, the contract proceeds were placed in escrow with the National Bank of Commerce and were still held by the Bank at the time of trial.

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9. The Settlement Agreement (Def. Ex. A-20-B) provides with respect to the approximately $20,000 in proceeds received from Rayonier pursuant to the Rayonier-Jackson Contract:

> "That the $20,215.36 payment received by Mrs. Jackson from Rayonier Incorporated, together with interest earned thereon, shall be deposited in an irrevocable escrow account with a mutually agreeable escrow agent with instructions to deliver said monies, together with all interest thereon, to Polson, in the event judgment shall be for defendant in *F. Arnold Polson v. Rayonier Incorporated,* U.S.D.C., Western District of Washington, Cause No. 2865, or in the event said action shall be dismissed without judgment; and to redeliver said monies, together with all interest thereon, to the estate in the event of judgment for plaintiff in said action."

10. The Escrow Agreement provides in part as follows:

> "*Delivery to F. Arnold Polson:* In the event that litigation entitled *F. Arnold Polson v. Rayonier Incorporated,* U. S. District Court, Western District of Washington Cause No. 2865, shall be concluded with judgment for Rayonier Incorporated, or, shall be dis-

QUESTIONS PRESENTED

1. Did Cleveland Jackson, as managing partner of the joint venture, have inherent or apparent authority to negotiate and execute the Rayonier-Jackson contract and the Addendums?

2. Did Polson ratify the Rayonier-Jackson contract by any one or more of the following acts:

a. By delaying with knowledge for at least 18 months in advising Rayonier of his claim that the Rayonier Jackson contract was unauthorized?

b. By filing a creditor's claim against the Estate of Cleveland Jackson for the contract proceeds?

c. By making a continuing demand upon the Jackson Estate for payment to him of the contract proceeds?

d. By bringing suit against the Jackson Estate for the contract proceeds?

e. By settling the lawsuit against the Jackson Estate and exercising dominion over the contract proceeds?

3. Was the plaintiff, because of his conduct, estopped:

a. To deny the validity and enforceability of the Rayonier-Jackson contract?

b. To recover more than simple or single damages for either timber trespass or for waste?

4. Were the Rayonier-Bumgarner Contracts valid and enforceable contracts, and could Rayonier as a purchaser from Nina Bumgarner, a cotenant, have committed either statutory trespass or waste?

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missed without judgment. the property deposited as above-described shall be delivered to said F. Arnold Polson.

"*Delivery to Anna A. Jackson:* In the event that the said litigation above-described shall be concluded with judgment for F. Arnold Polson, the property deposited as above-described shall be delivered to said Anna A. Jackson."

5. Was Rayonier acting in bad faith and without probable cause to believe that it was proceeding under valid and enforceable contract rights when it logged the Bumgarner Allotments?

6. Since Jackson signed the Rayonier-Jackson contracts, was the plaintiff entitled to recover damages for the full value of the timber from the Bumgarner Allotments, rather than a lesser amount corresponding to his interest in the Polson-Jackson Joint Venture?

7. Was the plaintiff entitled to interest on single damages from the date of trespass?

8. Did the Court err in not entering adequate Findings of Fact and Conclusions of Law as required by Rule 52(a), F.R.C.P.?

9. Did the court err in making material Findings of Fact and Conclusions of Law that are not supported by the evidence?

SPECIFICATIONS OF ERRORS

I.

The Court erred in entering the following mixed Findings of Fact and Conclusions of Law:

1.1 ***Finding and Conclusion No. 4 (R. 335)****

This Finding and Conclusion is clearly erroneous as it is in conflict with the testimony of the plaintiff and of his attorney, is not supported by the record, and is based

*This Finding & Conclusion, as well as each of the other Findings & Conclusions to which error is assigned, are set forth in an Appendix to the brief.

upon the erroneous premise that Polson was not aware of the Rayonier-Jackson Contract "until the spring of 1961" and "did not have full knowledge of all material facts regarding the contract until July of 1961." The conclusion that Polson's delay in notifying Rayonier until July 23, 1962, was reasonable is not supported by the record and is erroneous.

Further, the Court's conclusion that Polson's failure to notify Rayonier of the lack of authority of Jackson did not prejudice or mislead Rayonier is clearly erroneous and contrary to undisputed facts. There is no question but that Rayonier was substantially prejudiced if it incurred a liability for treble damages in the amount of $69,000 for timber valued at $23,000 that it cut and removed from the Bumgarner Allotments, the greater portion of which was cut during the five months subsequent to the date when Polson admitted he had in his possession a copy of the Rayonier-Jackson Contract.

In addition, Rayonier was substantially prejudiced as it made payments totalling approximately $20,000 to the Estate of Cleveland Jackson pursuant to the Rayonier-Jackson Contract, $12,000 of which was paid after July 1, 1961, and made payments to the Bureau of Indian Affairs pursuant to the Addendums and the Contract of over $2,200 for fees for administering the timber from the Allotments.

1.2 ***Finding and Conclusion No. 5 (R. 335) as follows:***

Exhibit B: (Judge's Oral Opinion which he incorporated by reference)

1.2.1 Page 2, para. 5 (R. 340-1), which commences on line 22, page 2, and ends on line 5, page 3.

This Finding and Conclusion is erroneous as it ignores the fact that Jackson as Managing Partner of the joint venture had inherent authority pursuant to the Uniform Partnership Act to negotiate and execute the Rayonier-Jackson Contracts. It is further erroneous for the reason that Rayonier, as a purchaser from Nina Bumgarner under the Rayonier-Bumgarner contracts, could not as a matter of law have committed either statutory trespass or waste.

1.2.2 Page 3, para. 1. (R. 341) This Finding and Conclusion is erroneous for the following reasons:

(i) It ignores the defense that Jackson, as Managing Partner of the joint venture, had inherent authority under the provisions of Section 9 of the Uniform Partnership Act to negotiate and execute the Rayonier-Jackson Contract.

(ii) It ignores the fact that Polson as a matter of law either ratified the Polson-Jackson Contract or is estopped to question its validity by reason of his following actions: remaining silent for at least 18 months and allowing Rayonier to log the Allotments; filing a creditor's claim in the Jackson Estate and claiming the contract proceeds; making a continuing demand through his attorney to have the proceeds paid to him by the Jackson Estate; commencing a lawsuit against the estate; and entering into a Settlement Agreement and an Escrow Agreement whereby he exercised dominion over the proceeds.

1.2.3 Page 4, para. 1, 2 and 3 (R. 342 and 343) (para. 3 carries over to line 5, page 5).

(i) The portion of para. 1, page 4 (R. 342), that there was no evidence that Beaulieu:

> "any time had, was held out as having, or exercised any responsibility, authority, or agency for either Polson individually or for the Polson-Jackson joint venture concerning the sale of either land or timber owned by the joint venture."

is contrary to the letters that Beaulieu wrote that were introduced into evidence (*e.g.*, Ex. 96), to his testimony (*e.g.* Tr. 487) and that of Libby. (Tr. 418) Para. 2 is erroneous as it is clear from Beaulieu's testimony and the exhibits that his duties were not "largely, if not wholly, clerical and ministerial, and . . . primarily, if not exclusively, concerned with the acquisition of timberlands by the Joint Venture and not the sale of Joint Venture property." Beaulieu testified that he "bought all of them. I wrote the deeds, practically arranged a sale, because they were heirship tracts of land and I knew who were the owners." (Tr. 443), (see also Tr. 487, 418)

(ii) Page 4, para. 3, lines 24 and 25, is clearly erroneous as is demonstrated by the letter that Beaulieu wrote (Ex. 96), by his testimony (Tr. 487), and by the testimony of John W. Libby. (Tr. 378, 418)

1.2.4 Page 5, para. 2 (lines 15 to 17) and para. 4, which carries over to line 5, page 6. (R. 343, 344)

These holdings are erroneous for the reason Beaulieu's knowledge was acquired as an employee of Polson's while assisting on Joint Venture matters and Polson, as a part-

ner, is charged as a matter of law with Beaulieu's knowledge.

1.2.5 Page 6, para. 1. (R. 344)

This Finding and Conclusion is contrary to the facts in this case and the applicable law, all as outlined in the Statement of Facts and the Argument portions of this brief.

In addition, the Court did not consider whether Rayonier was entitled to the benefit of the mitigation of damages provisions of R.C.W. 64.12.040, which section would reduce the damage from treble to single damages and the Court ignored the question of whether Polson's knowledge and failure to inform Rayonier should estop him from recovering more than single damages.

Exhibit C (Judge's Oral Opinion which he incorporated by reference)

1.2.6 Page 2, para. 3 (R. 349)

This holding is contrary to Washington law as there is no Washington authority for the imposition of interest on unliquidated damages for statutory trespass to timber.

1.2.7 Page 6, paras. 1 and 2 (R. 353)

This holding is contrary to both fact and law as Polson was allowed treble damages for the full value of the Joint Venture timber, not the amount that corresponded to his percentage of interest in the partnership.

Exhibit D (Judge's Oral Opinion which he incorporated by reference)

1.2.8 Page 3, para. 1 (R. 361)

This holding is contrary to both the undisputed facts as outlined in the Statement of Facts and the law as set forth in the Argument portion of this brief.

1.3 *That portion of Finding of Fact and Conclusion of Law No. 2 (R. 334, 335) as follows:*

> "it is the finding of the court that 'Fact Not to be Contested' No. 8 is hereby modified by the caveat stated by the plaintiff in connection therewith. It is the specific finding of this Court that Mr. Libby did not have authority to authorize a contract without procuring the approval of Polson, which approval was not obtained."

together with that portion of Finding of Fact and Conclusion of Law No. 5 that is lines 5-12, p. 10, Ex. C. (R. 357)

These portions of the Findings and Conclusions are erroneous for the following reasons:

a. Polson had no standing to question the Rayonier-Bumgarner Contracts, which contracts the parties have made no attempt to rescind or revoke or terminate. (R. 142 and 334)

b. It is in conflict with the testimony of John W. Libby and with the exhibits and other testimony introduced at trial.

II.

The court erred in not making the following Findings of Fact and Conclusions of Law:

2.1 That Jackson had either inherent or apparent au-

thority to negotiate with the Bureau of Indian Affairs and with Rayonier and to execute the Addendums and the Rayonier-Jackson Contract.

2.2 That the Rayonier-Jackson Contract is a valid and enforceable contract.

2.3 That the Addendums are valid and enforceable agreements between the Joint Venture and the Bureau of Indian Affairs.

2.4 That the Rayonier-Bumgarner Contracts are valid and enforceable contracts.

2.5 That the plaintiff had no standing to question the validity of the Rayonier-Bumgarner Contracts.

2.6 That Rayonier, by virtue of the legal relationship it occupied because of the Rayonier-Bumgarner Contracts, did not commit statutory trespass or waste when it logged the Bumgarner Allotments.

2.7 That Rayonier was acting in good faith and with probable cause to believe it was acting under a valid contract when it logged the Bumgarner Allotments.

2.8 That plaintiff, by his conduct, ratified the Rayonier-Jackson Contract.

2.9 That the plaintiff, by his conduct, was estopped to deny the validity and enforceability of the Rayonier-Jackson Contract.

2.10 That if plaintiff is entitled to any recovery he was estopped by his conduct to recover more than single damages for timber trespass or waste.

III.

3.1 The court erred in not entering adequate Findings of Fact and Conclusions of Law with respect to the issues in this case.

IV.

4.1 The court erred in not making additional Findings of Fact pursuant to defendant's motion for Additional and Amended Findings. (R. 288-333)

V.

5.1 The court erred in entering judgment for plaintiff for treble damages for trespass together with interest on single damages from date of trespass.

ARGUMENT

PART I

Jackson Had Inherent and Apparent Authority, as Managing Partner, to Negotiate with Rayonier and with the Bureau of Indian Affairs and to Execute the Rayonier-Jackson Contract and the Addendums. (Specifications of Error 1.1, 1.2.1 through 1.2.5, 1.2.8, 2.1, 2.2, 2.3, 2.7, 5.1)

Rayonier does not need to rely upon Jackson's actual authority to commit the Jackson-Polson interest to the Rayonier-Jackson Contract. (Pl. Ex. 15) It is clear that Jackson had inherent and apparent authority, as managing partner, to execute that contract as well as the Addendums (Pl. Exs. 9 and 10).

Inherent and Apparent Authority Defined

Inherent authority is defined in Section 8A of the Restatement of Agency, Second, as the power of an agent

which is derived not from authority, apparent authority or estoppel, but solely from the agency relationship. The law with respect to the inherent authority of a partner has been incorporated in Section 9 of the Uniform Partnership Act (R.C.W. 25.04.090(1)) which provides:

> "25.04.090 Partner agent of partnership as to partnership business. (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority."

Apparent authority is defined by Section 8, Restatement of Agency, Second, as the power to affect the legal relations of another by transactions with third persons, professedly as agent for the other (the Polson-Jackson Joint Venture) arising from and in accordance with the other's (Joint Venture's) manifestations to such third persons. This section has been cited with approval by the Washington Supreme Court in a number of cases, *e.g.*, *Debentures Inc. v. Zech*, 192 Wash. 339, 350, 73 P.2d 1314, 1319 (1937).

The application of either test of authority to the activities of the managing partner of a partnership is difficult. The provision of Section 9 of the Uniform Act of "apparently carrying on in the usual way" could, in an appropriate case, include both inherent and apparent authority for the test of "in the usual way" must be made in the context of the actual operation of the business.

Jackson Had Authority, as Managing Partner, to Negotiate and to Execute the Rayonier-Jackson Contract and the Addendums.

1. The business of the Joint Venture included the logging or contracting for the logging of timber.

The 1951 Joint Venture Agreement (Pl. Ex. 1) provided that the purpose of the Joint Venture was the "acquiring, selling, exchanging and disposing of timber and timberlands in Western Washington, including the logging or contracting for the logging of any timber so acquired." (R. 133 and 335) Clearly, Jackson was carrying on in the usual way the business of the partnership under the provisions of Section 9 of the Uniform Partnership Act when he negotiated with Rayonier and with the Bureau of Indian Affairs to have the timber on the Bumgarner Allotments logged, for this is squarely within the scope of the purpose of the Joint Venture.

2. Jackson was the manager of the partnership and its affairs were handled entirely by him.

The trial court made a finding that

> "Cleveland Jackson was the Manager of the Joint Venture and its affairs were handled primarily by Jackson." (R. 335)

Although the court used the word "primarily" in the Finding, Polson, in Def. Ex. A-45, which is the Joint Venture tax return for the year 1961 that was signed by him, stated in column 5, Schedule M, on page 3 that:

> "Since inception of joint venture until 1961, the affairs of the venture were handled *entirely* by deceased partner. [Jackson] Surviving partner (Polson) contributed all capital. Subsequent to demise

of managing partner (November, 1960) . . ." (Emphasis added)

3. Jackson was carrying on the partnership business in the usual way.

The decisions by the Washington Supreme Court state that in order to prove inherent authority on the part of a partner it is only necessary to show that the transaction was one which seemed to be for partnership purposes and was not an unusual transaction for the partnership or one ordinarily detrimental to a partnership engaged in that type of business. *Herr v. Brakefield,* 50 Wn.2d 593, 314 P.2d 397 (1957); *Melosevich v. Cichy,* 30 Wn.2d 702, 193 P.2d 342 (1948); and *Merrill v. O'Bryan,* 48 Wash. 415, 93 Pac. 917 (1908).

In the *Herr* case the court stated:

> "While the evidence regarding the practice of selling entire herds of cattle would not lead to the inference that such a sale was *necessary* to the successful conduct of the cattle business and the farming operation, the showing was that such sales were not unusual and were appropriate and not ordinarily detrimental to enterprises of this kind. Especially in view of the fact that the sale of this herd did not destroy the farming operation and the further fact that Brakefield had, in all of the plaintiffs' dealings with him, acted as the managing partner with the tacit consent of Mrs. Stidham, we believe that the court was unjustified in concluding that he had no apparent authority to make the sale in question." 50 Wn.2d at 596-7, 314 P.2d at 399.

In addition, in determining whether Jackson was "apparently carrying on in the usual way the business of the partnership," it is illuminating to consider his conduct over the years with respect to the partnership and its affairs.

Polson himself represented that Jackson was the managing partner and that the partnership affairs were handled entirely by Jackson. (Def. Ex. A-45) During the years that the partnership was in existence Jackson acquired all of its real property, record title to which was in his name. (Def. Ex. A-19-L, p. 2) The Joint Venture bank account was in Jackson's name and Polson did not supervise the expenditure of funds. (Def. Ex. A-19-H, p. 4) Jackson was involved in continuous negotiations with the Bureau of Indian Affairs with respect to partition or logging of the Bumgarner Allotments and the Snell Allotments.[1] Whenever Beaulieu had a question, he was referred by Polson to Jackson. (Tr. 498-9, 446-7) Whenever John Libby of the Bureau of Indian Affairs had a question, he was referred by Beaulieu to Jackson, never to Polson. (Tr. 366, 418-20). Whenever Francis McCrory, Nina Bumgarner's son, had a question, he likewise was referred by Beaulieu to Jackson. (Tr. 333-4)

Polson testified that in 1960 both he and Jackson were anxious to sell the Joint Venture properties. (Tr. 74)

In a deposition that was taken of him in another lawsuit prior to the present action, Polson testified as follows concerning Jackson's activities with respect to a proposed sale of the Joint Venture timber and land in 1960:

"Q. A sale of all of your interests appeared to be in the offing?

"A. Yes . . .

"Q. All of the property acquired with the funds which you had advanced?

1. See Def. Exs. A-8, A-9 and A-10, and Exs. 72, 73, 75, 76, 80, 82, 83, 92-98; Tr. 355-390, 418-420.

"A. I couldn't say. It didn't get that far. He [Jackson] was handling it." (Tr. 73)

4. Rayonier and the Bureau of Indian Affairs had no knowledge of restrictions, if any, on Jackson's authority.

A proviso to paragraph 1 of Section 9 of the Uniform Partnership Act excludes from the operation of that section those instances where

> ". . . the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority."

Section 3 of the Uniform Partnership Act (R.C.W. 25.04.030) defines knowledge as that term is used in Section 9 of the Act as follows:

> "25.04.030 Interpretation of knowledge and notice. (1) A person has knowledge of a fact within the meaning of this chapter not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith."

(a) ***Rayonier's knowledge***

Rayonier's only knowledge within the scope of the above provision was that imposed by the 1951 Joint Venture Agreement, (Pl. Ex. 2), which agreement imposed no restrictions on Jackson's authority. It provided only that:

> "Sales or other dispositions of the tracts so acquired, or any of them, including contracts for the logging of timber thereon, shall be made from time to time as agreed upon by the parties hereto. . . ."

It will be argued that Rayonier could not rely on Jackson's authority as managing partner as it had notice by letter to its Seattle office in June, 1954, (Pl. Ex. 6), that

Jackson could not make right-of-way commitments but had only the authority granted by the 1951 Joint Venture Agreement. Forrest, who negotiated the Rayonier-Jackson contract in 1959, had never seen this letter, but was advised in 1954 by telephone from Seattle that Polson had objected in writing to the memorandum of intent relating to rights-of-way that is Pl. Ex. 5. The information that Polson objected to that memorandum came as no surprise to Forrest, as Jackson had told him that he had to get Polson's approval and subsequently had advised him that Polson did not agree. (Tr. 600, 601) It was at this time that Forrest first read a copy of the Joint Venture Agreement, although he had been aware of an agreement between Polson and Jackson as early as 1947.

Subsequent to 1954 Forrest became aware of Jackson's negotiations with the Bureau of Indian Affairs to partition the Bumgarner and Snell Allotments or to have them logged, which negotiations took place over a period of five years. Forrest and W. L. Vincent of Rayonier were kept informed of this activity, which included conferences and correspondence between the Bureau of Indian Affairs and Jackson and Beaulieu, through discussions with Bureau of Indian Affairs officials. (Tr. 603-4, 278-9, 209, 211, 373) It was certainly reasonable for them to assume that these activities were done with the consent and approval of Polson. Consequently, when Forrest was advised by Jackson and by the Bureau of Indian Affairs that Jackson had executed the Addendums (Ex. 101) and was advised by Jackson that Polson was agreeable to having Rayonier log the Bumgarner Allotments (R. 604), it was also reasonable for Forrest to assume that Jackson as Man-

ager of the Joint Venture had the requisite approval of Polson in order for him to contract to have Rayonier log the Bumgarner Allotments. In addition, Beaulieu telephoned Forrest on February 10, 1960, which was the day after Jackson executed the contract, and inquired whether the contract would be recorded and when logging would commence. (Tr. 291, 611; Def. Ex. A-51)

(b) ***The Bureau of Indian Affairs' knowledge***

Officials of the Bureau of Indian Affairs were aware that the Bumgarner Allotments were subject to the 1951 Joint Venture Agreement. However, officials of the Bureau of Indian Affairs had been negotiating with Jackson and with Beaulieu over the years with respect to either partitioning or logging the Bumgarner Allotments, as well as the Snell Allotments. There had been a continuing exchange of correspondence (Exs. 60 through 100) between the Bureau and Jackson and Beaulieu with respect to the Allotments. A number of discussions had taken place at Polson's offices in Hoquiam and on at least one occasion Polson was in the next office with his door open. As John W. Libby testified:

> "... in my dealings in connection with these properties, I considered Cleve Jackson to be the spokesman for the partnership. He was the man we could reach when we wanted to discuss these things. . . . Mr. Beaulieu normally referred us back to Mr. Jackson, not to Mr. Polson, and we just assumed that Mr. Jackson was the spokesman for the partnership, and we dealt directly with him on all of these matters." (Tr. 418) (See also Tr. 366)

(c) ***Rayonier and the Bureau of Indian Affairs had the right to rely on Jackson and his representations.***

It was not Rayonier nor the Bureau of Indian Affairs

that decided how the Polson-Jackson partnership would be operated. That decision was made by Polson and Jackson.

We are considering in this lawsuit, not the authority of an employee, but the authority of the managing partner of a partnership to enter into a contract. In order to negotiate with Rayonier and with the Bureau of Indian Affairs, Jackson necessarily had to make statements of fact, such as whether or not the Joint Venture was agreeable to contracting on certain stated terms and conditions.

Forrest had known Jackson from 1935. Polson had been a close friend of Jackson's from the 1930's until his death. Both Polson and Forrest had great confidence in Jackson and trusted him. Libby of the Bureau of Indian Affairs had known Jackson for years and testified that you could depend upon Jackson doing what he said he would do. It is submitted that the court's remarks in connection with Frank Beaulieu are equally applicable to Rayonier and the Bureau of Indian Affairs. There the court stated:

> "There is not the slightest evidence in the record to show that Beaulieu had any reason to suspect Jackson's integrity and responsibility until such time after his death or that he would not do that which he was required to do by the specific limitations of the Joint Venture agreement. . . .
>
> "In the circumstances, I believe Beaulieu was entirely fair, honest and reasonable in assuming that if the Bumgarner transaction were to mature into a sale, that Jackson had or would procure and have the necessary approval and authority of Polson, and consequently, he, Beaulieu, had no reasonable basis

for concerning himself with the matter of Jackson procuring such approval and authority from Polson." (R. 343)

5. The Joint Venture is bound by Jackson's representations concerning Polson's knowledge and approval.

The representations by Jackson concerning Polson's knowledge and approval of a contract with Rayonier to log the Bumgarner Allotments were within the scope of Jackson's authority as managing partner of a partnership, one whose purposes was the "logging or contracting for the logging of any timber so acquired." As such, the representations are within the scope of Section 11 of the Uniform Partnership Act (R.C.W. 25.04.110), which provides:

> "25.04.110 **Partnership bound by admission of partner.** An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership."

6. The execution of the Rayonier-Jackson contract and the Addendums was within the authority conferred in Jackson as managing partner.

The Washington Supreme Court in 1941 in *Quist v. Zerr*, 12 Wn.2d 21, 36, 120 P.2d 539, 546 (1941), quoted with approval Sections 50 and 73 of the Restatement of Agency, which sections are as follows:

> "§ 50. When Authority to Contract Inferred
>
> "Unless otherwise agreed, authority to make a contract is inferred from authority to conduct a transaction, if the making of such a contract is incidental to the transaction, usually accompanies such a transaction, or is reasonably necessary to accomplish it."
>
> "§ 73. What Authority Is Inferred

> "Unless otherwise agreed, authority to manage a business includes authority:
>
> "(a) to make contracts which are incidental to such business, are usually made in it, or are reasonably necessary in conducting it;"

Polson spent his adult life in the timber business and dealing in timber and timberlands. He had always resided in Grays Harbor County and was familiar with timber values and timber holdings. He entered into the Joint Venture with his long-time friend and employee, Cleveland Jackson, Chief of the Quinault Tribe, and with Jackson acquired interests in over 100 different allotments in the Quinault Reservation, but in Jackson's name.[2]

To further his plan of operations, Polson hired Frank Beaulieu from the Hoquiam Indian Service Affice. Beaulieu is an attorney whose duties with the Indian Service had involved Indian probates and gave him great familiarity with various Indian ownerships in the vicinity. (Tr. 428-30)

Polson, himself sophisticated in the business, left the management of the affairs to two sophisticated associates, Cleve Jackson and Frank Beaulieu. Considering the fact that the business of the Joint Venture included "contracting for the logging of any timber" and that the business had been conducted entirely from its inception by Jackson, as managing partner, the execution by Jackson of the Addendums and the Rayonier-Jackson Contract was clearly within Jackson's authority under the tests set out above

2. At least some acquisitions thus made were apparently at bargain prices; witness that they paid $4,350.40 for the undivided one-half interest in the two Bumgarner Allotments in 1951, for which they have received over $20,000 in stumpage payments and which still have a residual value of more than $16,000. (R. 166)

and Polson cannot now disclaim the authority of either Jackson or Beaulieu and the imputation of their knowledge to him or repudiate the representations they made in the course of managing the Joint Venture and its properties.

PART II

Regardless of Jackson's Authority, Polson Ratified the Rayonier-Jackson Contract and the Addendums by His Conduct (Specifications of Error Nos. 1.1, 1.2.2 through 1.2.5, 1.2.8, 2.2, 2.3, 2.8, 5.1)

Ratification Defined

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account whereby the act is given effect as if originally authorized by him. Sec. 82, Restatement of Agency, Second.[1]

Affirmance by Polson of the Rayonier-Jackson Contract and the Addendums Is Established by His Failure To Timely Repudiate.

1. General Rule Defined.

3 Am. Jur.2d, *Agency,* Sec. 178, pages 563-4, sets forth the general rule with respect to affirmance by silence as follows:

---

1. With respect to the events not required and not preventing ratification, Section 92, Restatement of Agency, Second, provides in part as follows:

"§ 92. Events Not Required for and Not Preventing Ratification:

"An affirmance by the principal of a transaction with a third person is not prevented from resulting in ratification by the fact:

. . .

"(d) that the agent conducting the transaction has died or lost capacity; or

. . .

"(f) that the agent or the other party knew the agent to be unauthorized; or

"(g) that the principal does not communicate with anyone."

"A principal, after receiving information that an act has been done without actual or apparent authority by one purporting to act as his agent on his behalf, is not bound by that act under the law of agency unless he ratifies the act; but he may and must elect to repudiate or ratify such act promptly or at least within a reasonable time. . . .

"Whether there has been ratification in a particular case is ultimately and ordinarily a question of fact. Strictly speaking, therefore, a failure to repudiate, or silence or acquiescence, after learning of an unauthorized act in a case where the principal has an opportunity to repudiate or object to the act, does not of itself constitute ratification. Yet it is, if the one purporting to act as agent is not a mere stranger or intermeddler, cogent or prima facie evidence on which ratification may be inferred in the light of surrounding circumstances."

In Section 179 of 3 Am. Jur.2d, *Agency,* pp. 565-6, the general rule with which respect to the time within which to repudiate an unauthorized transaction is set forth as follows:

"While a failure promptly to repudiate the agent's acts may under some circumstances amount to an adoption or ratification thereof, as where a failure to repudiate speedily may impose loss or injury upon the third person, the rule applicable generally is that where an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility therefor. . . . If after a reasonable time he does not so disaffirm, ratification will be presumed, especially if the principal, with knowledge of the unauthorized act, remains silent or acquiesces therein for a long period of time without objection."

Section 94 of Restatement of Agency, Second, says:

"§ 94. Failure to Act as Affirmance

"An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it."

2. The Washington court follows the general rule.

The question of ratification by silence has been before the Washington Supreme Court on a number of occasions. In *Waldron Co. v. Beattie Mfg. Co.*, 113 Wash. 533, 537, 194 Pac. 557 (1920), the court considered an objection by the appellant to an instruction to the jury whereby the jury was told that unless the defendant, after knowledge of the unauthorized act, communicated its repudiation to the plaintiff, then the appellant was guilty of unfair dealing and ratified the contract.

The court held that the instruction was correct, quoting the following statement from a previous opinion in *Baker v. Seattle and Puget Sound Packing Co.*, 95 Wash. 45, 48, 163 Pac. 17 (1917):

> "Even if the agent had no authority to make the contract which was made with the respondent, after the principal had been informed of the contract and did not promptly reject it, but acquiesced therein, it seems too plain for argument that this would amount to a ratification of it." 113 Wash. at 537, 194 Pac. at 558.

See also *Tobias v. Towle*, 179 Wash. 101, 105, 35 P.2d 1114 (1934), adhered to by the court sitting en banc in 179 Wash. 107, 41 P.2d 1119 (1935), and approving Restatement of Agency, Section 94, quoted above; *Northwestern Lum. Co. v. Cornell*, 99 Wash. 250, 169 Pac. 590 (1917); *Lemcke v. Funk & Co.*, 78 Wash. 460, 139 Pac. 234 (1914); *Ankeny v. Young Bros.*, 52 Wash. 235, 100 Pac. 736 (1909).

3. Polson, by his conduct ratified the Rayonier-Jackson Contract and the Addendums.

A stronger case for the application of the doctrine of ratification by silence can scarcely be imagined. The applicable facts are as follows:

(a) In November of 1960, Beaulieu and Raymond Swanson, one of Polson's attorneys, obtained the information that portions of the Bumgarner Allotments were scheduled for logging that is written on Def. Ex. A-1-A opposite the statement "log contract—Jackson, Rayonier, Bumgarner."

(b) On January 20, 1961, Polson and his attorneys, Richard K. Bush and Raymond Swanson, attended a meeting in Hoquiam, Washington. When asked when he first learned of Rayonier logging the Bumgarner Allotments, Polson testified that something at that meeting "alerted me to a situation. . . . There was something going on that I didn't know about. . . . I [promptly] conferred with my attorney on it. . . . I put it in his hands, to get as much information on it as he could." (Tr. 159-161)

(c) Shortly after the January 20 meeting a copy of the Rayonier-Jackson contract came into Polson's possession. (Tr. 163-4)

(d) On January 28, 1961, Beaulieu wrote a letter to Polson (Def. Ex. A-39-A). Appended to this letter was a copy of the Addendum for Allotment No. 1678 (Def. Ex. A-39-C) and the original of a hand-written note from L. J. Forrest of Rayonier to James Jackson, dated November 30, 1960 (Def. Ex. A-39-D) forwarding to Jackson a copy of the Addendum.

(e) Attorney Bush received Beaulieu's letter of January 28, 1961 and the Addendum from Polson shortly after January 28, 1961. (Tr. 557-8)

(f) Bush went to the Western Washington Indian Agency office in Everett, Washington between the period of February 15, 1961 and April 15, 1961 and obtained the information on the Bumgarner Allotments that logging had not yet commenced on Allotment No. 1678, that logging was in progress on Allotment No. 1679 and that payments were being made directly by Rayonier to Jackson, less the 10 percent administrative fee. (Def. Ex. A-13)

(g) Bush discussed the Rayonier-Jackson contract with Beaulieu not later than March, 1961. (Tr. 562-3)

(h) Logging did not commence on Allotment No. 1679 until January 10, 1961. (R. 142)

(i) Logging did not commence on Allotment No. 1678 until April 17, 1961, which allotment provided over 65 percent of the value of the timber removed from the two Bumgarner allotments. (R. 142 and 166)

(j) During the period from February 16, through August 24, 1961, Rayonier made payments totalling $19,-815.36 to Anna Jackson as Executrix of the estate of Cleveland Jackson pursuant to the Rayonier-Jackson contract. (Def. Exs. A-46-A through F) In addition Rayonier made payments to and received credits for payments of $2,193.89 to the Indian Agency during the same period for the 10 percent administrative fee pursuant to the Addendums and the Rayonier-Jackson contract.

(k) On November 3, 1961 (Def. Ex. A-57) and again on November 9, 1961 (Def. Ex. A-56) Richard K. Bush, Polson's attorney, wrote letters to L. J. Forrest of Rayonier concerning Cleveland Jackson and his affairs and on neither occasion made any mention of any irregularity or problem concerning the Rayonier-Jackson contract, the Bumgarner Allotments or the logging on the Bumgarner Allotments by Rayonier. At approximately the same time Bush conversed with L. F. Marion, one of Rayonier's attorneys, concerning a possible meeting with L. J. Forrest to discuss Cleveland Jackson and his affairs and made no mention of the Bumgarner Allotments, or any irregularities with respect to the Rayonier-Jackson contract.

(l) On July 23, 1962, Bush wrote to Rayonier (Def. Ex. A-55). This was the first time that Polson or anyone on his behalf informed Rayonier that Polson was contending that the Rayonier-Jackson Contract was unauthorized.

(m) There is no evidence that Polson at any time prior to the commencement of this lawsuit communicated to the Bureau of Indian Affairs his contention that the Addendums (Exs. 9 and 10) were unauthorized.

(n) Notwithstanding the fact that Bush and John Kirkwood, the attorney for the Executrix of the Cleveland-Jackson estate, had frequent contacts during 1961 and 1962, including a short discussion in 1961 involving the Rayonier-Jackson contracts proceeds, the first time that Kirkwood knew that Polson contended the Rayonier-Jackson contract was unauthorized was approximately the date of commencement of this lawsuit on August 21, 1962. (Tr. 514-516)

With the above factual background in mind, it is difficult to understand the trial court's finding that "Polson was not aware of the existence of the logging contract until the spring of 1961." (F.F.&C.L. 4, R. 335) In addition, there is no evidence to support the additional finding that: "He [Polson] did not have full knowledge of all material facts regarding the contract until July of 1961." (F.F.&C.L. 4, R. 335)

Ignoring the fact that Polson should have been aware of the Rayonier-Jackson contract in the fall of 1960 by reason of the information on the three schedules prepared for him by Beaulieu, (Def. Exs. A-1, A-14 & A-15) Polson clearly had full knowledge of the Rayonier-Jackson contract not later than February 1, 1961, at which time he had a copy of the contract in his possession. He also obtained a copy of the Addendum shortly after that time and gave it to Bush.

It is obvious that the belated attempt by Polson to repudiate the contract on July 23, 1962, and the subsequent lawsuit was but an afterthought on his part. That Polson never had any intention until 1962 of attempting to repudiate the Rayonier-Jackson contract is clear from his conduct and that of his attorney, Bush. In 1954 when Jackson entered into a simple memorandum of intent, (Pl. Ex. 5) Polson quickly exhibited his non-concurrence by writing Rayonier by Registered Mail, even though the letter of intent was nothing more than a simple statement that if Rayonier in the future was furnished a legally sufficient easement, it would do certain things at that time.

What happened after Polson admittedly had knowledge of the Rayonier-Jackson contract and of Rayonier's plans to log and that logging was in progress? With counsel at his side at all times, Polson did not advise Rayonier of his contention that the contract was unauthorized until July 23, 1962—eighteen months after he first obtained a copy of the contract. In fact, in June, 1961, Polson filed a creditor's claim in the Jackson estate, whereby he sought to have the funds from the logging turned over to him. In addition, through his attorney he had three contacts with Rayonier during November, 1961, concerning Cleveland Jackson, and made no mention of any irregularities with respect to the Bumgarner Allotments or the logging contract. Are these the actions of a man who intends to repudiate as unauthorized a logging contract? Compare these actions with those of Polson in 1954, when an innocuous letter of intent, of which he did not approve, prompted a registered letter. The only conclusion that can be drawn from the above conduct is that Polson had no intention of repudiating the Rayonier-Jackson contract until long after the logging was completed, and that his decision to attempt it was an afterthought.

Further, even after Polson belatedly decided to question the contract, he was unwilling, even then, to completely repudiate the contract and take any chance on losing the contract proceeds if his treble-damage action against Rayonier should fail. So, after he commenced suit against Rayonier, he also sued the Jackson estate to obtain the contract proceeds as a hedge against the outcome of this treble-damage lawsuit. As is demonstrated by the settlement agreement, (Def. Ex. A-20-B) and the escrow

agreement (Def. Ex. A-20-A) the lawsuit against the Jackson estate was successful. In fact, Polson was so successful in obtaining the contract proceeds for his own benefit that the court allowed Rayonier to set off the $20,000 it had paid against Polson's treble-damage judgment in this case. (F.F.&C.L. 5, R. 354)

With respect to the court's holding that: "Rayonier has not established Polson's failure to inform Rayonier that Jackson had no authority to enter into the contract was unreasonable in the existing circumstances. . . ." (R. 335), it is submitted that Polson's conduct was not only unreasonable but inexcusable. Polson knew that L. J. Forrest was employed by Rayonier and he knew how to contact Forrest. (R. 136) By not picking up the telephone and telephoning Forrest—or anybody else at Rayonier—Polson allowed Rayonier to continue to cut the timber on the two Bumgarner Allotments and to incur a continuously increasing liability if the cutting was improper. For Polson to stand silently by and watch Rayonier incur such liability because of a claimed invalid contract made by the managing partner of the partnership; to watch Rayonier make payments of $20,000 to the Jackson estate for the timber and $2,000 to the Bureau of Indian Affairs for administering the timber, is to act in bad faith and is unreasonable under any circumstances.

With respect to the court's finding that "Rayonier has not established . . . that Polson's conduct misled or prejudiced Rayonier" (R. 335), it would appear to be self-evident that Polson's silence during the 18-month period could not avoid prejudicing Rayonier if, at the end of that time, he could then speak and repudiate the con-

tract. Polson now says that during the 18-month period, Rayonier incurred a liability of $69,000 for cutting $23,-000 worth of timber in spite of having paid that full amount in accordance with the contracts of which Polson knew. If Polson had spoken during the six months from January, 1961, through July, 1961, and if Polson's claims are correct, Rayonier's loss and its potential liability for damages would have been substantially reduced. It should be kept in mind that over half the timber on Allotment 1679 was logged after February 1, 1961, that logging did not commence on Allotment No. 1678 until April 17, 1961, and that No. 1678 provided over 65 percent of the value of the timber removed. (Def. Exs. A-47 and A-48; R. 142) Less than $4,000 worth of Joint Venture interest in timber had been removed by February 1, 1961 (Def. Ex. A-48, R. 166). If Polson had spoken when he and his attorneys first knew of Rayonier's activities, little or no timber would have been cut—or at least Rayonier would have proceeded at its peril.

Polson chose not to speak, because he had no thought of attempting repudiation until eighteen months after he had a copy of the contract and, by his own admission, knowledge of Rayonier's activities. Without question, Rayonier was substantially prejudiced by his silence.

Further, by not promptly advising Rayonier, Polson allowed the period for filing creditor's claims in the Jackson estate (R.C.W. 11.40.010) to expire approximately June, 1961. As a result, Rayonier did not have an opportunity to present a claim against the Jackson estate for any liability or damage it might have incurred as a result of the Rayonier-Jackson contract and the claim by Polson.

Affirmance of the Rayonier-Jackson Contract Resulted from the Demands by Polson Upon the Jackson Estate for the Contract Proceeds.

1. Polson ratified the Rayonier-Jackson contract by filing his creditor's claim in the Jackson estate.

In June, 1961, Polson filed a creditor's claim in the Cleveland Jackson estate. (Def. Ex. A-19-E) Item (d) of that creditor's claim makes a claim for all "monies received by deceased from the sale of timber situated upon [Joint Venture] lands. . . ." Polson testified at the trial that at the time he filed the creditor's claim, he suspected that the Jackson Estate had received monies from Rayonier for timber that had been cut and removed from the Bumgarner Allotments, (Tr. 126) and that:

> ". . . I was aware that there had been a trespass, and there was money that was in evidence." (Tr. 125, ll. 15-17)

and:

> ". . . there was some money in evidence and perhaps available . . . and we didn't have the exact accounting of it, and we couldn't get it, so we made a claim for it." (Tr. 126, ll. 8-11)

Research reveals only one instance where substantially the same question has been before the court. In *Miles v. Gadsden*, 139 S.C. 52, 137 S.E. 204 (1927), plaintiff's purported agent made an unauthorized collection of a mortgage payment from the defendant. The plaintiff then filed a claim with the administrator of the purported agent's estate for the payment that had been made on defendant's mortgage. At a later date, it was determined that the purported agent's estate was insolvent, and the plaintiff brought suit against the defendant for the amount

of the payment. The court, in upholding the report of the Master, held that the filing of the claim by the plaintiff in the purported agent's estate was a ratification of the payment that had been made by the defendant to the purported agent. This case and the rationale behind it is equally applicable to the instant case, for Polson would have had no basis upon which to file a claim against the Jackson Estate for the contract proceeds unless he considered them to be a joint venture asset and had no intention at that time of attempting to disavow the Rayonier-Jackson Contract.

2. Polson ratified the Rayonier-Jackson Contract by making a continuing demand on the Jackson Estate for payment to him of the proceeds.

In his deposition of September 15, 1965, Richard K. Bush, the attorney for plaintiff Polson, testified as follows:

(Witness Bush reading from his deposition at page 31, line 20)

"Q. Did you ever make demand or did anyone on your behalf ever make demand on either Mrs. Jackson or her attorney for those proceeds?

"A. I don't think that there was any formal, written demand made on her.

"Q. Was oral demand made upon her?

"A. Yes, oral demand was made, but I'm not sure exactly at what point, at what time.

"Q. What was the nature of the oral demand? Who made it? Where was it made?

"A. Well, I would be reasonably confident that I would have been the one to have made the demand. I don't think anyone else did. I think it would have been in Mr. Kirkwood's office. I think—I can't

tell you the time it was made. I don't think that Mr. Kirkwood—well, I don't know whether I have answered the question or not. I don't think that —I don't know what Mr. Kirkwood's response was. I don't think—I don't believe that he resisted the demand or felt that the money should not be paid over to us, but I do know that Mrs. Jackson indicated that she was not going to pay it over to us.

"Q. Would this demand have been made prior to July, 1961?

"A. I am sure, no, because I'm sure we didn't know with any definiteness what money she had, if any. I'm not even sure that we knew at that time that she had any money from Rayonier with respect to this.

"Q. About when would it have been made? Would it have been made prior to the commencement of suit against Rayonier?

"A. I'm sure that the first request for the — made was prior to that time, and I think that that is the point at which Mrs. Jackson indicated — whether she said that 'I won't pay it to you,' she did not pay it to us, and at some point she said she wasn't going to pay it to us.

"Q. And on whose behalf did you make this demand, Mr. Bush?

"A. Well, I made the demand on behalf of Mr. Polson.

"Q. As his attorney?

"A. As his attorney." (Tr. 567-569)

and line 24 on page 34:

"Q. Is this when the demand was made, that we are referring to, or was it made prior to the time suit was commenced against Rayonier, or when?

"A. Well, from the time that we first knew of the amount of money that had been paid to Mrs. Jackson, there were, I'd say — there was a standing

demand, really, for the payment of that money to us." (Tr. 566)

Polson had no basis for demanding the payment to him of the proceeds unless he considered them to be a joint venture asset. By making a continuing demand for the proceeds, Polson ratified the Rayonier-Jackson Contract just as he ratified the contract when he filed his creditor's claim in the Jackson Estate.

3. Polson ratified the Rayonier-Jackson contract by filing a lawsuit against the Jackson Estate for the contract proceeds.

On approximately February 15, 1963, Polson commenced a lawsuit against Anna Jackson, individually, and as Executrix of the Estate of Cleveland Jackson, in Grays Harbor Superior Court. A copy of the complaint is Def. Ex. A-20-D.[2]

Polson testified at trial that he considered the $20,000 in proceeds to be the property of the Joint Venture and that he made the allegations in paragraph XI of the First Cause of Action on the basis that he, Polson, was entitled to have the funds paid to him pursuant to the 1951 Joint Venture Agreement, which is Pl. Ex. 2 (Tr. 135-6).

Paragraph XI describes as a joint venture asset the $20,000 received by the Jackson Estate from Rayonier pursuant to the Rayonier-Jackson contract, which funds were then in existence and in the custody of the Executrix

2. It is stipulated that the references in Para. XI of the First Cause of Action (p. 4, Def. Ex. A-20-D) and Para. IV of the Second Cause of Action (p. 6, Def. Ex. A-20-D) to "the sum of Twenty Thousand Dollars ($20,000), more or less," refer to the payments that had been made by Rayonier to the Jackson Estate pursuant to the Rayonier-Jackson contract for timber cut and removed from the Bumgarner Allotments. (Tr. 132, 133 and 591)

of the Jackson Estate. In the first paragraph of the prayer of the complaint, (Def. Ex. A-20-D) Polson prayed for judgment against the defendant Anna Jackson as follows:

> "1. That the assets of the joint venture of the plaintiff and the deceased, Cleveland Jackson, be adjudged, confirmed and set over to the plaintiff free and clear from any further right or claim of defendant, and defendant's estate be adjudged to have no further interest in or claim against said joint adventurers;"

Further evidence of the fact that the lawsuit clearly involved a claim by Polson for the contract proceeds is the fact that the settlement agreement of the lawsuit (Def. Ex. A-20-B) makes a disposition of the contract proceeds.

That Polson ratified the Rayonier-Jackson contract by bringing suit for the proceeds is supported by Section 97, Restatement of Agency, Second, which section reads in part:

> "§ 97. Bringing Suit or Basing Defense as affirmance.
>
> "There is affirmance if the purported principal, with knowledge of the facts, in an action in which the third person or the purported agent is an adverse party:
>
> "(a) brings suit to enforce promises which were part of the unauthorized transaction or to secure interests which were the fruit of such transaction and to which he would be entitled only if the act had been authorized; or . . ."

Comment "a" to Section 97 states:

> "Comment:
>
> "a. *Action against agent or other party.* The suit

> may be against the other party for the purchase price of goods sold to him, or against the purported agent for money or other things received by him for the principal. The bringing of the suit or the basing of a defense in such cases is a manifestation of an election by the principal which, having been made, cannot be retracted. His intent to ratify is immaterial."

A similar question was presented to the court in *Newman v. Morgan*, 202 Ala. 606, 81 So. 548 (1919), which was a suit between the principal as plaintiff and his agent as defendant. The court held that by suing the agent for the proceeds of an allegedly unauthorized settlement made by the agent with a third party, the principal thereby ratified the defendant's acts. See also *Hart v. Maney*, 12 Wash. 266, 271, 40 Pac. 987, 988 (1895), where the court approved an instruction to the effect that plaintiff recognized the contract in question by suing the defendant for the value of the lumber that was delivered and consequently could not attempt to repudiate the contract and escape liability for a breach of contract.

By electing to bring an action against the Jackson Estate for the contract proceeds, Polson ratified the Rayonier-Jackson Contract, regardless of his intention to do so, just as he ratified the contract when he filed the creditor's claim and made demands for the proceeds.

4. Polson ratified the Rayonier-Jackson Contract by exercising dominion over the proceeds and accepting the benefit of the proceeds.

On March 13, 1963, John Kirkwood, the attorney for Anna Jackson, Executrix of the Jackson Estate, advised Bush by letter (Def. Ex. A-43) that Anna Jackson made no claim to the $20,000 in proceeds from the Rayonier-

Jackson Contract, and offered to transmit the funds to Bush at that time.

Thereafter, a settlement was entered into between Polson and Anna Jackson, individually and as Executrix, of the lawsuit against the Estate. The settlement agreement (Def. Ex. A-20-B) provides that the $20,000 proceeds received from Rayonier would be deposited in an irrevocable escrow account, with instructions to deliver the funds, together with interest thereon, to Polson in the event that he should dismiss this lawsuit or Rayonier should prevail.

The provision of the settlement agreement with respect to the contract proceeds was not requested by Kirkwood or Anna Jackson, but was a part of the settlement agreement prepared by Polson and presented to them. The Jackson Estate was making no claim to the funds at the time the settlement was made and the agreement executed. (Tr. 519, 520) Pursuant to the settlement agreement Bush prepared an escrow agreement, (Def. Ex. A-20-A; Tr. 594) which agreement was executed on June 18, 1963, by Polson, Anna Jackson and the National Bank of Commerce and provided for an irrevocable escrow of the contract proceeds. The agreement provided that in the event the present litigation was concluded with either a judgment for Rayonier or was dismissed without judgment, the contract proceeds would be delivered to Polson, and if the litigation was concluded with a judgment for Polson, the contract proceeds would be delivered to Anna Jackson.

One of the affirmative defenses presented by Rayonier was the question of whether it was entitled to setoff against any judgment the $20,000 it had paid to the Jack-

son Estate. The trial court in one of its oral opinions held that ". . . under all the circumstances Rayonier should have a credit for that payment." (R. 354) Implicit in the court's ruling is the determination that Polson, by filing a creditor's claim, bringing suit against the Jackson Estate, settling the lawsuit and entering into the irrevocable escrow arrangement with respect to the proceeds, had exercised sufficient dominion over the proceeds that Rayonier was entitled to setoff the amount it had paid.

The general rule is stated in Section 98 of the Restatement of Agency, Second, as follows:

> "§ 98. Receipt of Benefits as Affirmance
>
> "The receipt by a purported principal, with knowledge of the facts, of something to which he would not be entitled unless an act purported to be done for him were affirmed, and to which he makes no claim except through such act, constitutes an affirmance unless at the time of such receipt he repudiates the act. If he repudiates the act, his receipt of benefits constitutes an affirmance at the election of the other party to the transaction."

The same general rule was recognized in Wahington in *McDougall v. McDonald*, 86 Wash. 334, 338, 150 Pac. 628, 629 (1915). There the court stated in a suit between the partners that where the defendant knew of an advance that was made by the plaintiff, and he knowingly participated in the use of the funds and never questioned the agreement until a completion of the contract, he must be held to ratify the contract. See also *Lemcke v. Funk & Co.*, 78 Wash. 460, 465, 139 Pac. 234, 236 (1914), where the court stated:

> "It is elementary that a principal who, with knowledge, accepted the benefits of a transaction conduct-

ed by an assumed agent, is deemed to have ratified it *in toto*."

Polson, by virtue of the settlement agreement and the irrevocable escrow agreement, received the benefit of something to which he was not entitled unless the Rayonier-Jackson Contract was, in fact, a valid contract. If the Rayonier-Jackson contract was unauthorized, the proceeds belonged to Rayonier, not to Polson or the Jackson Estate. It is obvious that there was no intention on Polson's part to preserve the funds for Rayonier as they were to be returned to the Jackson Estate in the event that Polson was successful in his lawsuit.

It is submitted that Polson exercised full dominion over the contract proceeds and received their benefit at the time that he entered into the settlement of his lawsuit. In fact, it was the denial of his right of full and complete dominion over the proceeds that is the very basis of his allegations in paragraph XI of the First Cause of Action, and paragraph IV of the Second Cause of Action in his complaint.

PART III.

Regardless of Jackson's Authority, Polson Is Estopped to Deny the Validity and Enforceability of the Rayonier-Jackson Contract or to Recover More Than Single Damages. (Specifications of Error 1.1, 1.2.2, 1.2.5, 1.2.8, 2.8, 2.10, 5.1)

Definition of Estoppel

Estoppel is fundamentally a doctrine that operates by creating a liability, by denying a cause of action which might otherwise accrue, or by creating a defense to an action. It may result from misrepresentation or, within

a limited area, from a failure to reveal facts. "The situations in which estoppel works are limited by the peculiar procedural way in which it operates, that is, by preventing the one against whom it operates from pleading the truth." Comment "a" to Section 8B, Restatement of Agency, Second.

Statement of the General Rule

Section 8B, Restatement of Agency, Second, sets forth the general rule as follows:

> "§ 8B. Estoppel—Change of Position
>
> "(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if
>
> "(a) he intentionally or carelessly caused such belief, or
>
> "(b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts. . . .
>
> "(3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability."

For example, in *Harms v. O'Connell Lumber Co.*, 181 Wash. 696, 44 P.2d 785, 787 (1935), the court was considering a situation where Mrs. Harms allowed the defendant to construct approximately $2,500 worth of railroad tracks on her land. The defendant had title to the timber upon her land under a deed which required removal within a reasonable time, and that time had apparently passed. In holding that Mrs. Harms was estopped

to raise the question of expiration of defendant's rights under the deed, the court stated:

> "If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent. This rule of estoppel is applicable where the owner of property stands by and knowingly permits another to expend money upon it by making improvements, erecting buildings, and the like." (p. 700)

Polson Is Estopped by His Silence to Question the Validity of the Rayonier-Jackson Contract.

In the present case, Polson is estopped by reason of his silence, when he knew that Jackson had executed the Addendums (Exs. 9 and 10) and the Rayonier-Jackson contract; that Rayonier would expend considerable sums of money in connection with the preparation for the logging of the Bumgarner Allotment, including the building of roads; that Rayonier would proceed to log the Bumgarner Allotments and would expend considerable sums of money in connection with that operation; that Rayonier would make and was making substantial payments to the Executrix of the Jackson Estate pursuant to the Rayonier-Jackson contract; and that Rayonier would make substantial payments to the Bureau of Indian Affairs for administrative services pursuant to the Addendums to the contract. In addition, if in fact Polson intended to disavow the Rayonier-Jackson contract, he knew that each day that he delayed in asserting to Rayonier that Jackson did not have authority would result in additional prejudice as it would create (according to Polson's theories and claims) a potential liability of three times the actual value for each tree that was cut by

Rayonier while he remained silent. There is no question that Rayonier "changed its position," as that term is defined in the Restatement.

Polson had known L. J. Forrest for over 25 years, had been his good friend for 20 years, at all times knew that Forrest was employed by Rayonier and knew how to contact Forrest, although not immediately or within any specific limited period of time. (R. 135, 136, 31-5)

In assessing whether Polson should be estopped for his failure to speak under these circumstances for 18 months after he admits he had a copy of the Rayonier-Jackson contract, comment "d" to Section 8B of the Restatement of Agency, Second, is relevant. This comment says in part:

> "*Extent of duty to give information.* When one realizes that another is or may come under a misapprehension as to the authority of his agent or the ownership of his property,—a misapprehension for which he is not at fault,—his duty to give information is a duty of due care. It is proportioned to the likelihood of harm and to its extent. If only a specific third person is involved, the duty of the purported principal can frequently be discharged by an inexpensive letter or telephone message . . . All that can be stated is that the action required is that which would be taken by a reasonably prudent business man, with the normal regard for the interests of others and his own reputation."

Treble damages under the provisions of either R.C.W. 64.12.030 or R.C.W. 64.12.020 are not appropriate where the owner of the timber knows of the logging and takes no action. The Washington Supreme Court has stated in a number of cases that one of the three purposes of the

timber trespass statutes is to discourage a person from intentionally making the owner of timber an unwilling seller. See *Guay v. Washington Natural Gas Co.*, 62 Wn. 2d 473, 476, 383 P.2d 296, 299 (1963). This purpose is only fulfilled if the owner is not aware of the trespass until after it has been completed. If an owner is aware of the logging of his timber and does and says nothing, *he is no longer an unwilling seller, he is a willing seller.* If one by silence permits the logging of his timber, then the purpose and intent of the punitive treble damages provision of the trespass and waste statutes would be abused if he is not then estopped from claiming the benefits of the statutes.

PART IV

Rayonier, as a Purchaser from Nina Bumgarner, a Cotenant of Polson, Could Not Have Committed Either Statutory Trespass or Waste. (Specifications of Error 1.2.1, 1.2.3, 1.2.4, 1.2.6, 1.2.8, 1.3, 2.1, 2.3, 2.4, 2.5, 2.6, 5.1)

The Rayonier-Bumgarner Contracts Are Valid and Enforceable Contracts.

On July 24, 1959, the Superintendent sent timber contracts covering Nina Bumgarner's interest in the two Bumgarner Allotments to Rayonier. (Ex. 99) On August 26, 1959, Rayonier forwarded executed timber contracts (Pl. Exs. 13 and 14) on the two Allotments to the Superintendent for approval. (Ex. 102) Thereafter, on August 27, 1959, John W. Libby, as Acting Superintendent, approved the contracts and wrote Rayonier (Ex. 103), forwarding the approved contracts.

On October 12, 1959, C. W. Ringey, Superintendent,

wrote to Rayonier in response to its letter of October 8, 1959. (Ex. 108) In this letter, Ringey referred to the fact that Nina Bumgarner's one-half interest in the two Allotments had recently been included under the Crane Creek Contract and acknowledged the fact that he was aware at that time that Rayonier had not yet entered into a contract with Cleveland Jackson with respect to logging of the other undivided one-half interest in the two Bumgarner Allotments.

The court entered findings to the effect that Nina Bumgarner executed the powers of attorney (Exs. 7 and 8) that she was legally competent to do so, and executed the powers of attorney voluntarily and not under duress, coercion or fraud, and that the powers of attorney remained in full force and effect and unrevoked from March 11, 1959, to the date of commencement of the lawsuit. The court found that the Crane Creek Contract is a valid and enforceable contract, and that pursuant to the Crane Creek Contract and the General Timber Sale Regulations that are appended to the contract, Rayonier submitted to the Portland Area Director of the Bureau of Indian Affairs proposed logging plans for 1961, which plans included portions of the Bumgarner Allotments and were approved by the Director. The court further found that Rayonier's road construction and logging operations on the Bumgarner Allotments were conducted pursuant to and in accordance with the logging plans that were approved by the Portland Area Director and were in accordance with the Crane Creek Contract, and that all live timber that was cut and removed by Rayonier from the Bumgarner Allotments have been marked

or otherwise designated for cutting by the officer in charge as required by the General Timber Sale Regulations that are appended to the Crane Creek Contract. (R. 141, 142, 334)

The court made the further finding that there was no fraud, coercion or duress in connection with the execution and approval of the Rayonier-Bumgarner contracts by John W. Libby, as Acting Superintendent, that the Rayonier-Bumgarner contracts have not been revoked, rescinded or terminated by any of the parties, and that John W. Libby was the Acting Superintendent on August 27, 1959, and, as Acting Superintendent, was authorized to execute the Rayonier-Bumgarner contracts on behalf of Nina Bumgarner and to approve said contracts as Superintendent. (R. 142, 334)

The court, however, made a further finding that "Mr. Libby did not have the authority to authorize a contract without procuring the approval of Polson, which approval was not obtained." (R. 335) It is not clear from the court's opinion what effect, if any, is to be given to this finding.

John W. Libby testified at trial that the only condition to his approval of the Rayonier-Bumgarner contracts was the execution by Jackson of the Addendums. (Tr. 411-12) From the factual background as outlined in the Statement of Facts, Libby was certainly entitled to rely on Jackson's authority to execute the Addendums. In brief, Libby had been negotiating with Jackson and with Beaulieu for approximately ten years with respect to either partitioning or logging the Bumgarner Allotments. When-

ever he made an inquiry with respect to the Allotments, he was directed by Beaulieu to Jackson. It was certainly reasonable after the Indian Agency received Jackson's letters of May 15, 1959 (Ex. 93) and June 18, 1959 (Ex. 95) and Beaulieu's letter of June 18, 1959 (Ex. 96) for Libby to conclude that Jackson was authorized to execute the Addendums. (Exs. 9 and 10)

In the court's oral opinion of March 11, 1966, the court stated that ". . . I think the proof presented and the facts found [are] sufficient to establish on both [trespass and waste]." (R. 351) In addition, in his April 25, 1966 oral opinion, the court held that in the event it was determined on review that trespass does not lie, that waste will lie. (R. 361) The only way that Rayonier could have committed waste was as a cotenant of Polson and the only basis upon which it could have been a cotenant was by virtue of its status as purchaser under the Rayonier-Bumgarner contracts. Therefore, it is obvious from the court holdings that he did not consider his statement on Libby's authority as affecting the status of the Rayonier-Bumgarner contracts.

In addition, regardless of Libby's authority, C. W. Ringey, the Superintendent of the Western Washington Indian Agency, stated his approval of the Rayonier-Bumgarner contracts when he wrote to Rayonier on October 12, 1961. (Ex. 108) Furthermore, any inference from the court's statement that the Rayonier-Bumgarner contracts were not valid, enforceable and binding contracts is inconsistent with the holding by the court that Rayonier's road construction and logging operations on the Bumgarner Allotments were conducted pursuant to and

in accordance with the logging plans approved by the Portland Area Director and in accordance with the Crane Creek Contract. (R. 141, 334)

Although it is conceivable that either Nina Bumgarner or the Bureau of Indian Affairs could attempt to rescind the contracts on the basis of a mistake of fact with respect to Jackson's authority to execute the Addendums, the court found that none of the parties to the Rayonier-Bumgarner contracts had done so. As the parties have made no attempt to rescind or revoke the contracts, what conceivable standing does Polson have, a person not a party to the contracts, to question whether or not the Superintendent could have made a mistake of fact when he approved the contracts.

Rayonier as Purchaser Under the Rayonier-Bumgarner Contracts Could Not as a Matter of Law Commit a Trespass on the Bumgarner Allotments

The Washington Timber Trespass Statute R.C.W. 64.12.030[1] is one of several alternatives available to a landowner who claims damages as the result of an allegedly unauthorized cutting of timber on his real property. Other remedies include action for common law trespass, replevin, conversion and implied contract. *Bill v. Gattavara,* 34 Wn.2d 645, 209 P.2d 457 (1949). How-

1. 64.12.030 Injury to or removing trees, etc.—Damages. Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.

ever, it is submitted that statutory trespass will not lie in this lawsuit as the timber has been cut by the defendant Rayonier under license from Nina Bumgarner, the cotenant of the Polson-Jackson joint venture.

The commission of a trespass by the defendant is one of the prerequisites for recovering damages under R.C.W. 64.12.030 for the statute refers to the penalized conduct as "trespasses." The Washington legislature in adopting the precursor to R.C.W. 64.12.030 used the word "trespass" in its common law sense, for in describing which trespasses are to be penalized, the legislature used language very similar to that which has been employed by the courts in defining common law trespass. For example, the Washington Supreme Court has said that common law trespass:

> ". . . signifies no more than entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property." *Welsh v. Seattle and Montana R. Co.*, 56 Wash. 97, 99, 105 Pac. 166 (1909).

It would follow that unless there has been a trespass in the sense that the word "trespass" was defined at common law, the remedy created by R.C.W. 64.12.030 was not intended to be available.

It might be argued that the statute is not dependent upon the common law definition as the statute itself defines what is meant by trespass, i.e., "cutting timber on another person's land without lawful authority." The answer is obvious, for a cotenant who cuts timber on commonly owned property is cutting on his own land, not on the "land of another person." The only two courts

who considered the question under similar statutes so concluded, stating that "the statute was [not] intended to apply to a cotenant." *Buchanan v. Jencks,* 38 R.I. 443, 96 Atl. 307, 311 (1916), and that the statute "has no application to a case where the timber is cut by an owner of an interest in the land." *Fitzhugh v. Norwood,* 153 Ark. 412, 241 S.W. 8, 9 (1922).

In order to prevail, plaintiff has to argue that this statute creates a cause of action for trespass in one cotenant against the other cotenant or his licensee for cutting timber on the cotenancy. Such an action did not exist at common law and to so hold would ignore the statutory language "on the land of another," and would be contrary to the admonition of the Washington Supreme Court that the statute is penal in nature and must be strictly construed. *Bailey v. Hayden,* 65 Wash. 57, 117 Pac. 720 (1911). The only reasonable interpretation of the statute is that it creates the statutory remedy for certain common law trespasses which, of course, are by necessity described in the statute. Trespass is a prerequisite and where trespass would not lie at common law, the treble damage remedy is not available.

At common law an action for trespass would lie between cotenants only where one cotenant has ousted the other cotenant or where he had destroyed the commonly owned property. The question of whether it is possible for trespass to lie between cotenants has not been squarely presented to the Washington court. Two Washington decisions are helpful, however. In *McKnight v. Basilides,* 19 Wn.2d 391, 143 P.2d 307 (1943), and *McGill v. Shugarts,* 58 Wn.2d 203, 361 P.2d 645 (1961), it is stated as a general rule that:

> ". . . the entry of a cotenant on the common property even if he takes the rents, cultivates the land, or cuts the wood and timber without accounting or paying for any share of it, will not ordinarily be considered as adverse to his cotenants and an ouster of them." 58 Wn.2d 204, 361 P.2d at 646.

The question has been squarely presented in two jurisdictions with timber trespass statutes similar to Washington's. *Buchanan v. Jencks*, 38 R.I. 443, 96 Atl. 307 (1916), was a suit for double and treble damages for timber trespass brought by four of the five cotenants against a license of the fifth cotenant.[2]

In construing the statute, the Rhode Island Supreme Court said:

> "It will be observed that this statute penalizes a defendant who shall without leave commit a trespass on the land of another person. We do not think that this statute was intended to apply to a cotenant, or his licensee, who had a right to enter upon the land and to avail himself of its benefits and revenue, but was designed to protect the owners of land from the invasion of those who were strangers to the title." 96 Atl. at page 311.

The court discussed the question of whether the cutting of merchantable timber by one cotenant on the common property could ever amount to a trespass. It acknowledged the rule that a tenant in common may become a trespasser if his conduct amounts to an ouster of his cotenants or a destruction of the common property. But,

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2. The Applicable Statute Provided:
"Section 1. Every person who shall cut, destroy, or carry away any tree, timber, wood, or underwood whatsoever, lying or growing on the land of any other person, without leave of the owner thereof, shall, for every such trespass, pay the party injured twice the value of any tree so cut, destroyed, or carried away; and for the wood, or underwood, thrice the value thereof; to be recovered by action of trespass." 96 Atl. at page 311.

said the court:

> "We do not find anything in the evidence showing an ouster of the plaintiffs. So far as appears, they were in no way prevented by the defendant or by Thayer [his licensor] from entering upon the premises and cutting and removing timber and wood had they seen fit to do so, and we do not think that the sale, cutting, and removal of matured timber and wood amounts to a destruction of the property which the law contemplates." 96 Atl. at page 310.

Fitzhugh v. Norwood, 153 Ark. 412, 241 S.W. 8 (1922), involved a statutory timber trespass action brought by one tenant in common against another under an Arkansas statute.[3]

In reversing a judgment for the plaintiff, the court said:

> "We are of the opinion that the statute quoted above has no application to a case where timber is cut by the owner of an interest in the land. The statute authorizes the recovery of damages for trespass committed by a stranger. On land owned by several persons as tenants in common, neither of the owners is a trespasser." Id. 241 S.W. at page 9.

Many other cases have held that a tenant in common cannot be treated as a trespasser for cutting timber on the commonly owned property. In *Kirby Lumber Co. v. Temple Lumber Co.,* 125 Texas 294, 83 S.W.2d 638

3. The Statute Provided:

> "If any person shall cut down, injure, destroy or carry away any tree placed or growing for use or shade, or any timber, rails, or wood, standing, being or growing on the land of another person, or shall dig up, quarry or carry away any stone, ground, clay, turf, mold, fruit or plants, or shall cut down or carry away, any grass, grain, corn, cotton, tobacco, hemp or flax, in which he has no interest or right, standing or being on any land not his own, or shall willfully break the glass, or any part of it, in any building not his own, every person so trespassing shall pay the party injured treble the value of the thing so damaged, broken, destroyed or carried away, with costs." Id., 241 S.W.2d at page 9.

(1935), at page 645, the Supreme Court of Texas said:

> "We are inclined to the view that where one cotenant merely cuts and appropriates more than his share of the standing timber on land owned jointly by himself and others, he cannot be charged by the other joint owners with the manufactured value of such excess timber, for in cutting the timber he makes no unusual use of the real estate of which he is a tenant in fee, and he cannot be classed as a trespasser."

See also *Kane's Adm'r v. Garfield's Adm'r,* 60 Vt. 79, 13 Atl. 800 (1888); *Gulf Red Cedar v. Crenshaw,* 188 Ala. 606, 65 So. 1010 (1914); *Filbert v. Hoff,* 42 Pa. 102, 82 Am. Dec. 493 (1862); *Jones v. McBee,* 222 N.C. 153, 22 S.E.2d 226 (1942); *Alford v. Bradeen,* 1 Nev. 228 (1865); *Hastings v. Hastings,* 110 Mass. 280 (1872).

The general rule with respect to licensing a third party to cut timber is stated in *Freeman on Cotenancy and Partition,* Sec. 253:

> "By either lease or license, a joint tenant, copartner, or tenant in common, may confer upon another person the right to occupy and use the property of the cotenancy as fully as such lessor licenser [sic] himself might have used or occupied it if such lease or license had not been granted. If either cotenant expels such licensee or lessee, he is guilty of trespass. . . . Whenever either of the cotenants may lawfully cut or remove trees, he may authorize another to do so."

In *Buchanan v. Jencks,* 38 R.I. 443, 96 Atl. 307 (1916), in considering the question of whether a cotenant could license a third person to cut timber on the common property, the court said at page 309:

> "We see no reason why a cotenant in the enjoyment of his rights as such cannot authorize another to do whatever he might lawfully do himself. A con-

> trary view, if followed to its logical conclusion, would restrict a cotenant's enjoyment of the common property to the sphere of his own personal activities, and would deprive him of the aid of others whom he might desire or need to employ."[4]

The defendant has been unable to find any case where a licensee has been treated as a trespasser with respect to nonconsenting cotenants. On the other hand, there is authority that a licensee who is on the cotenancy with the authority of one but not all of the defendants cannot be held in trespass. In *Williams v. Bruton,* 121 S.C. 30, 113 S.E. 319 (1922), it was held that a grant of a right of way to a licensee from one cotenant without the consent of the other would absolve the licensee from liability as a technical trespasser although it would not absolve him from liability to the cotenants for any injury to the cotenancy. For the general proposition that a licensee cannot be treated as a trespasser see also *Dinsmore v. Renfroe,* 66 Cal. App. 207, 225 Pac. 886 (1924); *Harris v. City of Ansonia,* 73 Conn. 359, 47 A. 672 (1900); and *DeLa Pole v. Lindley,* 131 Wash. 354, 230 Pac. 144 (1924), where the Washington court refused to treat a lessee as a trespasser even though his lease extended to all of the cotenancy and had not been authorized by one of the cotenants, the court indicating that the lessee would be considered a tenant in common with the nonconsenting cotenant.

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4. For other cases supporting this proposition, see *Baker v. Wheeler,* 8 Wendell 505, 24 Am. Dec. 66 (1832); *Alford v. Bradeen,* 1 Nev. 228 (1865); *Jasper Land Co. v. Manchester Sawmills,* 209 Ala. 446, 96 So. 417 (1923); *Hocksprung v. Stevenson,* 82 Mont. 222, 266 Pac. 406 (1928) (a mining case); *Sullivan v. Sherry,* 111 Wis. 476, 87 N.W. 471 (1901); *Dinsmore v. Renfroe,* 66 Cal. Appeals 207, 225 Pac. 886 (1924) (which is not a timber case but which is frequently cited for the proposition that a cotenant can license a third party to operate on the cotenancy).

Rayonier, Pursuant to the Rayonier-Bumgarner Contracts, May Have Rights Greater Than Those of a Licensee

In the preceding portion of this brief, defendant assumed for the purpose of argument that Rayonier was the licensee of Nina Bumgarner with respect to the timber on the Bumgarner Allotments. However, Rayonier as a purchaser under the contracts with Nina Bumgarner may have greater rights than those of a licensee. See *Hitchcock v. Frank,* 63-1 U.S.T.C., para. 9497; *Barclay v. U.S.,* 333 F.2d 847 (Ct. Cl. 1964) and *Guistina v. U.S.,* 313 F.2d 710 (9th Cir. 1963). Whether or not Rayonier would be characterized as a tenant in common with the Polson-Jackson Joint Venture in the timber on the Allotments is open to serious question.

However, if Rayonier was a tenant in common with the Polson-Jackson Joint Venture, then any legal question concerning the licensee's liability in trespass would be irrelevant. There would seem to be no question but what the parties could be cotenants as to the timber. In *DeLa Pole v. Lindley,* 131 Wash. 354, 230 Pac. 144 (1924), a lessee of one cotenant's interest in a cotenancy was treated as a tenant in common with the other cotenants, and in *Yarwood v. Johnson,* 29 Wash. 643, 70 Pac. 123 (1902), the court recognized the existence of a tenancy in common in a mining claim. In addition, as a cotenant Rayonier could not have committed a trespass under provisions of R.C.W. 64.12.030 for the reason that it would not have been on the land of another without lawful authority.

Rayonier Did Not Commit Waste

If Rayonier is held to be a cotenant of the Polson-Jackson Joint Venture, then the plaintiff will argue that Rayonier committed waste under the provisions of R.C.W.

64.12.020 when it cut and removed the timber from the Bumgarner Allotments.[5] The plaintiff will concede that the waste statute does not apply to tenants in common in fee as it is applicable only to "tenant[s] in severalty or in common of real property for life or for years. . . ." *Graffell v. Honeysuckle*, 30 Wn.2d 390, 395, 191 P.2d 858, 861 (1948). If Rayonier is a tenant in common with Polson with respect to the timber on the Bumgarner Allotments, it clearly is a cotenant in fee, for its right to the timber is absolute, subject only to being divested of its interest in the timber if it is not cut and removed prior to the expiration of the Crane Creek Contract (1986). As such, Rayonier's estate in the timber would be that of a fee simple determinable, which is an estate that has all of the attributes of a fee simple except that it is subject to being defeated by the happening of a condition. See *King County v. Hanson Investment Co.*, 34 Wn.2d 112, 118, 208 P.2d 113, 117 (1949). Although the Washington court has not passed upon the question of the nature of the interest acquired pursuant to a timber contract, the court did state in *Colman v. Layman*, 41 Wn.2d 753, 757, 252 P.2d 244, 246 (1953), that such an estate "possibly may be said to have the characteris-

5. 64.12.020 Waste by guardian or tenant, action for. If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant or subtenant; in which action, if the plaintiff prevails, there shall be judgment for treble damages, or for fifty dollars, whichever is greater, and the court, in addition may decree forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. The judgment, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court. But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice.

tics of a determinable estate, with the possibility of reverter in plaintiffs, subject to a special limitation, rather than of an estate subject to a condition subsequent." See also *Heybrook v. Beard*, 75 Wash. 646, 649, 135 Pac. 626 (1913). In any event it is clear that the interest acquired is not that of a "tenant for years" and that the waste statute, R.C.W. 64.12.020, is inapplicable to this action.

PART V

In the Event a Trespass Occurred, Only Single Damage Should Have Been Awarded. (Specifications of Error 1.2.5, 1.2.8, 2.7, 5.1)

Under the circumstances of this case, if plaintiff is to prevail, only single damages should be awarded under the provisions of R.C.W. 64.12.040, which provides:

> "*Mitigating circumstances—Damages.* If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, . . . judgment shall only be given for single damages."

The Washington court has had the opportunity to comment on a number of occasions with respect to the subjective test to be applied to determine whether a defendant is liable for penal damages.

In *Tronsrud v. Puget Sound Traction, Light & Power Company*, 91 Wash. 660, 158 Pac. 348 (1916) the Supreme Court, in denying treble damages, said:

> " . . . It would be misusing this law [the treble damage law] to visit upon the mistaken a penalty intended for the wanton." 158 Pac. at 349.

See also *Blake v. Grant*, 65 Wn.2d 410, 379 P.2d 843

(1964); *Grays Harbor County v. Bay City Lumber Company,* 47 Wn.2d 879, 887, 289 P.2d 975, 980 (1955); *Mullally v. Parks,* 29 Wn.2d 899, 190 P.2d 107 (1948); and *Gardner v. Lovegren,* 27 Wash. 356, 359, 67 Pac. 615, 616 (1902) where the court approved the following instruction:

> ". . . if you find that the defendant went upon the plaintiff's land in good faith in the honest and sincere belief that the land was their own, or that their going upon the plaintiff's land was not marked by any spirit of wantonness, wilfullness or evil design, then you must find that the defendant's action was not wilful. In other words, before you can determine that the defendant's action was wilful, the preponderance of the testimony must satisfy you that the trespass was not only against the consent of the plaintiff, but that it was intended by circumstances of bad faith and intentional wrong on the part of said defendant."

Rayonier logged the Bumgarner Allotment at the urging of the Indian Agency to give immediate financial relief to an elderly Indian lady, and only after it had entered into contracts with Nina Bumgarner, approved by the Superintendent, and with Cleveland Jackson, the managing partner of the Joint Venture. Even if it should be determined that Jackson did not have authority to execute the Rayonier-Jackson contract, Rayonier's conduct, under the facts of this case, cannot be characterized as "wanton," "wilfully," "reckless disregard" or "evil design." Accordingly, if a trespass occurred, only single damages should have been awarded.

PART VI

At Most, the Amount of Polson's Recovery Must Be Limited to the Interest That Polson Had in the Joint Venture Assets or Profits, Exclusive of Jackson's Interest. (Specifications of Error 1.2.7, 1.2.8, 5.1)

Jackson had no rights against Rayonier

Neither Jackson nor Jackson's Estate had any rights against Rayonier with respect to the logging on the Bumgarner Allotments, as Rayonier paid to the Jackson Estate the full amount called for by the Rayonier-Jackson contract and the contract had been executed by Jackson. Certainly neither Jackson nor Jackson's Estate would be allowed to claim that the contract was unauthorized and sue for single damages, much less treble damages. Polson took an assignment of Jackson interest (Def. Ex. A-20-B) and cannot collect what Jackson or Jackson's Estate could not have collected from Rayonier, for an assignee takes no greater rights than those possessed by the assignor. See *Paullus v. Fowler,* 59 Wn.2d 204, 212, 367 P.2d 130 (1961); *Phelps v. Kroll,* 211 Iowa 1097, 235 N.W. 67 (1931); 4 *Corbin on Contracts,* Sec. 892, at p. 585.

As will be demonstrated, Jackson (and his Estate) had either a one-half interest in the assets or in the profit from each sale.

Jackson Had a One-Half Interest in the Partnership Assets

Prior to Jackson's death, one-half of the partnership interest in the Bumgarner Allotments was owned by Jackson and one-half by Polson. Upon Jackson's death, his estate succeeded to his one-half interest, which interest was later assigned to Polson. Under the 1951 Joint Venture Agreement (Pl. Ex. 1) Polson was to furnish all funds for the purchase of property and Jackson was to give Polson his promissory note for one-half of the purchase price of each purchase, payable out of the proceeds from the subsequent sale or logging of the particular parcel of property.

When the Joint Venture acquired an undivided one-

half interest in the Bumgarner Allotments for $4,350, Jackson accordingly gave Polson his promissory note in the amount of $2,175 for his one-half of the purchase price. This note is page 2, Pl. Ex. 3.

Thus, under the 1951 agreement, Polson contributed directly to the partnership one-half of the funds to purchase a particular parcel of property. The other half of the necessary funds was loaned by Polson to Jackson on an individual obligation of Jackson to Polson to be evidenced by a promissory note. In turn, the money borrowed by Jackson from Polson was contributed by Jackson to the partnership completing the sum needed to purchase the particular investment. Polson thereby owned a one-half interest in the partnership and its assets and Jackson owned the other half. As stated in *McDonald v. McDonald,* 119 Wash. 396, 405, 206 Pac. 23, 26 (1922):

> "It is true the money loaned was borrowed for the use of the partnership and was used in the partnership business, but the respondent, by signing the note as maker, became individually responsible for the payment of the note. In other words, the parties dealt as strangers to the partnership relation, and by their act isolated the transaction from the general partnership account."

As Polson and Jackson had equal shares in the partnership and the contributions to the partnership, they also had equal shares in any partnership assets. See R.C.W. 25.04.240. Therefore, one-half of the partnership interest in the timber cut and removed by Rayonier from the Bumgarner Allotments belonged to Jackson (or the Jackson Estate), and one-half to Polson and Polson's recovery, if any, should have been limited to his one-half interest, not the full interest as awarded by the court. (R. 353)

Alternatively, Jackson Had a One-Half Interest in the Profits

As an alternative argument, and even assuming that Jackson's interest in the partnership assets was limited to one-half of the profit, it still follows that of the $69,000 trebled damages awarded by the court, approximately $31,550 would have belonged to Jackson (or the Jackson Estate) and $31,550 would have belonged to Polson, prior to the assignment of the Jackson Estate's interest to Polson.

Under paragraph 4 of the 1951 agreement, each investment is to be dealt with according to the terms of the agreement. Those terms require that Polson be reimbursed for his contribution to the partnership and his contribution to Jackson, which latter sum was also contributed to the partnership by Jackson. Following such reimbursement of Polson for the money placed in the partnership by him and for the money loaned by him to Jackson to contribute to the partnership, the remaining portion or profits were to be divided equally by Jackson and Polson.

It is clear from the Joint Venture Income Tax Return (Def. Ex. A-45) that was filed by Polson that one-half of the net profit from each investment was treated as income to Jackson and one-half as income to Polson. This same approach was used by Polson in the accounting that he filed in the Jackson Estate. (Def. Ex. A-19-D)

Therefore, for the purpose of determining Jackson's (or the Jackson Estate's) share of the profits from the cutting of timber by Rayonier on the Bumgarner Allotments, there must be subtracted from the potential recovery of $23,000 trebled the costs to the partnership. These costs are: (a) the cost of purchasing the Bumgarner Allotments ($4,350), and (b) other costs incurred

by the partnership in connection with the investment (35%[1] of the purchase price, or approximately $1,550), or a total debit of $5,900. Subtracting the total debits from the potential recovery of $69,000, the partnership was left with profits in the amount of $63,100.

Accordingly, the Jackson Estate's interest would have been one-half of the profits, or $31,550, and, conversely, Polson's one-half interest in the profits is $31,550, and his recovery, if any, should have been limited to that amount.

1. The 35% factor was used by Polson in his accounting in the Jackson Estate. See Def. Ex. A-19-D at pp. 8-10.

PART VII

The Plaintiff Is Not Entitled to Interest Under Washington Law. (Specifications of Error 1.2.6, 1.2.8, 5.1)

The Washington court has not passed upon the question of interest in actions of trespass or injury to real or personal property.[1] However, in several cases involving damage or destruction to personal property, the court has held that interest is not allowed since the damages are unliquidated. See *Mojonnier & Sons v. Railway Express Agency*, 52 Wn.2d 569, 573, 328 P.2d 167, 169 (1958); *Lamb v. Railway Express Agency*, 51 Wn.2d 616, 619, 320 P.2d 644, 646 (1948); *Jellum v. Grays Harbor Fuel Co.*, 160 Wash. 585, 593, 295 Pac. 939, 941 (1931); and *Phifer v. Burton*, 141 Wash. 186, 251 Pac. 127, 128 (1926).

Furthermore, the general rule allowing interest in tres-

1. According to 36 A.L.R.2d 337, 397-398, Sec. 32, the general rule is that in actions of trespass for injury to or destruction of real or personal property, interest may be allowed as part of the damages. Whether, and the extent to which, interest is allowed in waste actions, has been decided in only two old cases, one in West Virginia and one in England. See 36 A.L.R.2d 337, 492, Sec. 79. Washington, however, does not follow the general rule.

pass actions does not apply where the trespass or waste cause of action is for statutory treble damages.

In *McCloskey v. Ryder,* 138 Pa. 383, 21 Atl. 150 (1891), the plaintiff was seeking treble damages for the defendant's action in cutting timber on plaintiff's property. The Supreme Court of Pennsylvania held that the trial court was correct in trebling the damages and not allowing any interest to be given to the plaintiff. No interest was allowed either on the trebled amount or on the single damage amount. The court stated (at p. 151):

> "The treble damages are given as a penalty, and we know of no case in which a penalty bears interest until the plaintiff's right to it has been settled by judgment. The learned judge of the court below was right, therefore, in excluding the interest, and entering the judment for three times the single value of the trees cut and carried away."

In addition, the Washington court has commented on the question in dictum. In *Blake v. Grant,* 65 Wn.2d 410, 397 P.2d 843 (1964), a trespass case for removal of timber was before the court. The case involved treble damages. Judgment was given for the plaintiff at the trial court and interest was allowed on the trebled amount of damages from the time of trespass. The Supreme Court made the following statement:

> "In the instant case, the trial court allowed the interest from the date of conversion upon the punitive two-thirds portion of the award as weil as the compensatory one-third part. It is recogized that the *Grays Harbor* case, [*289, P.2d 975*] *supra,* was not an action for treble damages; that our statutory action for treble damages is in the nature of a penalty [citing cases], and that interest is generally disallowed on punitive damages. 15 Am. Jur., Damages Sec. 299. p. 740. However, since counsel for the appellants has not presented this point, and the amount

> involved is very small, we do not decide the question." 65 Wn.2d at 413, 379 P.2d at 844-5.

15 Am. Jur., *Damages,* Sec. 299, p. 740, cited in the above Washington case states:

> "Interest is not recoverable in statutory actions for double to treble damages." [Citing cases]

Both R.C.W. 64.12.030 and R.C.W. 64.12.020 are penal statutes. In neither statute is interest suggested and, not being specifically provided for, should not be allowed. As stated in *Bailey v. Hayden,* 65 Wash. 57, 117 Pac. 720 (1911), the trespass treble damage statute is "penal in nature, not merely remedial. As such it should be strictly construed." 65 Wash. at p. 61, 117 Pac. at p. 721.

The plaintiff in bringing his action under the above two statutes has made an election not to sue for single damages with interest. The plaintiff could have elected to sue defendant for conversion and, pursuant to *Grays Harbor Co. v. Bay City Lumber,* 47 Wn.2d 879, 289 P.2d 975 (1955), recovered interest as well as damages. The same type of situation was presented in *McCloskey v. Ryder,* 138 Pa. 383, 21 Atl. 148, 150, where the court stated:

> "But the Act of 1824 does not give a new action but a statutory measure of damages 'to be recovered with costs of suit by action of trespass or trover as the case may be.' This action is trespass *quare clausum,* in which the *plaintiffs have declared for double or treble value of the trees as their measure of damages instead of single value with interest.*" (Emphasis added)

PART VIII

The Trial Court Erred by Failing to Enter Adequate Findings of Fact and Conclusions of Law as Required by Rule 52, F.R.C.P. (Specifications of Error 3.1 and 4.1)

The trial court, in its oral opinions (R. 337-354) stated his findings and conclusions in a summary manner. He disposed of defendant's affirmative defenses, which have been presented in the preceding seven parts of this brief, with the statement that they were not established by a preponderance of the evidence. (R. 341) In addition, in Finding and Conclusion No. 4 (R. 335), the court considered only one facet of ratification, i.e., ratification by silence.

From the court's oral opinions it is impossible to determine the basis of his decision on each of the affirmative defenses or whether he even ruled on them. He apparently rested his decision upon a lack of proof, but this was clearly erroneous as a number of the defenses were based on undisputed facts, *e.g.*, ratification by filing a creditor's claim, by demanding the proceeds, by suing the Jackson Estate, and by settling the lawsuit and exercising dominion over the proceeds. In addition, the court completely ignored the arguments that Jackson had inherent authority, as managing partner, under the Uniform Partnership Act, to execute the Rayonier-Jackson Contract and that Rayonier, as a purchaser from Nina Bumgarner, could not as a matter of law, have committed trespass or waste. It was for these reasons that appellant filed a motion under Rule 52 for additional findings, which motion particularized the areas where the court had failed to make findings and conclusions in compliance with Rule 52. (R. 288-333)

However, notwithstanding the trial court's failure to

comply with Rule 52, and to grant appellant's motion, it is submitted that there are sufficient undisputed facts in the record to establish any one of Rayonier's affirmative defenses and that the interests of justice require that the Court of Appeals should decide the questions involved, rather than remand the case to the District Court for further proceedings.

CONCLUSION

This is a strange lawsuit.

The plaintiff has not been damaged, as he has received the full value of the joint venture interest in the timber cut, which incidentally is about five times what he paid for the whole (and he still has a residual interest worth nearly four times the purchase price).

The cutting complained of was done in response to good faith efforts by the Western Washington Indian Agency and others to provide funds for an elderly, needy, Indian lady. The cutting was done under the watchful eye of the Indian Service and pursuant to an approved plan for good forestry and sustained yield practices.

The defendant has paid the full value of the timber it cut and has received no special benefit or advantage.

The plaintiff and his employees and attorneys had personal knowledge of the existence of the contracts involved, of Rayonier's plans to log and of Rayonier's actual logging, either in advance of the logging or very soon after commencement of logging. The failure of plaintiff and his attorneys to raise any objection or question about the proceedings can be characterized only in one of two ways:

(a) *They acted like normal people, who knew what was going on and approved and ratified it; or*

(b) *Their actions were so unnatural and contrary to*

normal human conduct that they must be estopped from objecting to the transactions.

A man who has spent his life in the timber business, who goes into business with an Indian chief and allows him *carte blanche* to acquire and deal in Indian timber lands, and who hires a specially knowledgeable Indian Service attorney to assist them, should not be permitted to suddenly declare himself isolated from the consequences of his own machinations and should not be allowed, after-the-fact, to pick and choose among their activities.

This lawsuit is an obvious afterthought on the part of the plaintiff Polson. His managing partner led Rayonier into a contract. Polson accepted the benefits of the contract. He and his attorneys waited for over eighteen months, with full knowledge, until asserting a right to repudiate the contract and to recover penal damages. The court should not lend itself to such an action.

The judgment of the District Court should be reversed, with directions from this court to enter judgment for appellant, Rayonier Incorporated.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DOUGLAS P. BEIGHLE
LUCIEN F. MARION
Of Counsel for Appellant

APPENDIX A

EXHIBITS INDEX TO TRANSCRIPT

Plaintiff's Exhibits

No.	*Identified*	*Offered*	*Received*
1	4	4	4
2	4	4	4
3	4	4	4
4	4	4	4
5	4	4	4
6	4	4	4
7	4	4	4
8	4	4	4
9	4	4	4
10	4	4	4
11	4	4	4
12	4	4	4
13	4	4	4
14	4	4	4
15	4	4	4
16	4	4	5
17	4	4	5
18	4	4	5
20	4	4	5
21	4	4	5
22	4	4	5
25	310	310	311
27	189	188	188
28	294	295	295
29	294	295	295
30	272	272	272
31	271	272	272
32	272	272	272
33	243	292	309
34	292	292	292
35	297		
50 through 115	108	109	109

Defendant's Exhibits

No.	*Identified*	*Offered*	*Received*
A-1	83	83	83
A-1-A	83	83	83
A-2	83	83	83
A-3	83	83	83
A-4	83	83	83
A-5	479	479	479
A-6	83	83	83
A-7	83	83	83
A-8	83	83	83
A-9	83	83	83
A-10	83	83	83
A-11	83	83	83
A-13	83	83	83
A-14	83	83	83
A-15	83	83	83
A-16	83	83	83
A-17	83	83	83
A-18	83	83	83
A-19-A through A-19-N	122	181	181
A-20-A through A-20-D	181	181	181
A-21-A through A-21-G	481	481	481
A-22-A through A-22-P	481	481	481
A-23	182	182	182
A-24-A through A-24-F	481	481	481
A-25-A through A-25-C	481	481	481
A-26-A through A-26-C	481	481	481
A-27-A through A-27-C	481	481	481
A-28-A through A-28-G	481	481	481
A-29-A through A-29-E	481	481	481

No.	*Identified*	*Offered*	*Received*
A-30	481	481	481
A-31	481	481	481
A-31-A through A-31-F	182	183	481
A-32-A through A-32-C	481	481	481
A-33-A through A-33-I	481	481	481
A-34	183	183	183
A-35	183	183	183
A-36	488	488	488
A-38	488	488	488
A-39-A through A-39-D	488	488	488
A-40	487	488	488
A-41	475	488	488
A-42	613	613	614
A-43	613	613	613
A-44	613	613	613
A-45	184	614	614
A-46-A through A-46-G	513	615	615
A-47	610	610	610
A-48	610	610	610
A-49	146	146	146
A-50	610	619	620
A-51	610	611	611
A-52	611	612	612
A-53	611	611	611
A-54	184	184	612
A-55	184	184	595
A-56	184	184	595
A-57	184	184	595
A-58	612	612	612
A-59	170	171	171
A-60	170	171	171
A-61	170	171	171
A-62	170	171	171
A-63	185	185	614

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW TO WHICH ERROR IS ASSIGNED

Specification Number	Finding and Conclusion
1.1	F. & C. No. 4 (R. 335)

"4. Polson was not aware of the existence of the logging contract until the spring of 1961, and he did not have full knowledge of all material facts regarding the contract until July of 1961. Rayonier has not established that Polson's failure to inform Rayonier that Jackson had no authority to enter into the contract was unreasonable in the existing circumstances, or that Polson's conduct misled or prejudiced Rayonier. Accordingly, Rayonier has failed to establish either its affirmative defense of Ratification or that of Estoppel."

1.2.1 F. & C. No. 5, Ex. B (R. 340-1)

"After full consideration of the evidence and the briefs and the authorities, I am satisfied that a preponderance of the evidence shows that all of the elements essential to establish a right of recovery by plaintiff for treble damages under RCW 64.12.-020 and/or in the alternative treble damages for cutting timber on the lands of another person without authority under RCW 64.12.030. have been fully established, and judgment should be for plaintiff unless precluded by one or more of the defendant's affirmative defenses."

1.2.2 F. & C. No. 5, Ex. B (R. 341)

"Each of the several defenses has been carefully considered in the light of the facts I find shown by a preponderance of the evidence I considered credible, and, of course, in view of the controlling authorities, in my opinion, the evidence actually preponderates against the defenses of estoppel, ratification, and apparent authority, but at a minimum

I must find, because I sincerely believe it to be correct, that there is not a preponderance of the evidence to sustain any of the affirmative defenses."

1.2.3 F. & C. No. 5, Ex. B (R. 342-3)

"There is no direct evidence in the case which I find credible, nor any inference from evidence which I consider reasonable, showing that Beaulieu any time had, was held out as having, or exercised any responsibility, authority, or agency for either Polson individually or for the Polson-Jackson joint venture concerning the sale of either land or timber owned by the joint venture. There is no evidence that he even so much as knew of a single proposed sale of joint venture land or timber other than as to the Bumgarner tract. He so testified, I believe him, and I do not consider any countervailing evidence has been offered.

"In my opinion, it is a fair inference from the evidence as a whole that Beaulieu's duties and responsibilities for the joint venture were largely, if not wholly, clerical and ministerial, and such as they were, his duties were primarily, if not exclusively, concerned with the acquisition of timber lands by the joint venture and not the sale of joint venture property.

"I find as a fact that such limited knowledge of the Bumgarner transaction as Beaulieu had, and in this respect I accept his statement of it and his views of what it amounted to at all times prior to the death of Jackson and for some time thereafter, indicated a tentative or proposed transaction. Beaulieu did not personally participate in that transaction, that is, in the negotiations or anything of that sort. He assumed, and under all of the circumstances I find he had a right to assume, that Jackson would not act in the matter in violation of his limited authority under the joint venture agreement which he, Beaulieu. knew of from the beginning of his employment for the joint venture."

1.2.4 F. & C. No. 5, Ex. B (R. 343-4)

". . . I further find under all the circumstances that it was not his responsibility or duty to report what little he knew of the matter to Polson."

1.2.5 F. & C. No. 5, Ex. B (R. 344)

"From these views it is my conclusion on the facts as found that the plaintiff is entitled to recover treble damages as prayed for based on RCW 64.-12.020 or, in the alternative, RCW 64.02.030, or both."

1.2.6 F. & C. No. 5, Ex. C (R. 349)

"Therefore, on that phase of the matter, I consider it so clearly indicated that further expense and delay in final disposition of this case by referral of the question to the State Supreme Court is not warranted. Therefore, I will hold and find in computing single damages, interest should be allowed."

1.2.7 F. & C. No. 5, Ex. C (R. 353)

"Certainly the resolution of the first of these two questions: namely, whether recovery should be allowed for the full amount of the value of the timber stipulated at $23,000, or for only one-half of that amount, is not entirely free from doubt.

"Any extended dissertation on the several facets of the question would take an extended statement. Viewing the situation as a whole, considering that recovery is for a wrongdoing, which the court has found and is fully satisfied was totally unjustified on the part of Rayonier, the terms of the joint venture agreement and the addenda thereto, and the practices of the parties make it very clear all Jackson was to have out of the joint venture business was a share in whatever profits might result from it. It was also made emphatically clear that Polson was to be fully reimbursed for funds expended by him before any consideration be given to a distribution of profits to Jackson. I am satisfied on the whole

issue that the recovery should be for the full amount of the single damages in the amount stipulated, and that will be the ruling of the court."

1.2.8 F. & C. No. 5, Ex. D (R. 361)

"Considering the latest memoranda and the entire record, I have no doubt whatever in my mind that recovery can and should be grounded in trespass. However, if on appellate review it should be determined that the action does not lie in trespass, I find that it should and does lie in waste. Therefore, I now hold and find that recovery be allowed for trespass, which, of course, will not include recovery of attorneys' fees; and if it be found on appellate review that recovery in trespass is not appropriate, it is found and held that recovery be allowed for waste including allowance for attorneys' fees in the amount previously specified."